STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IRENE REYNOLDS,)
)
Petitioner,)
and)
)
FLORIDA MEDICAL ASSOCIATION, INC.,)
)
Intervenor,) CASE NO. 96-1682RX
)
vs.)
)
AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Respondent.)
______________________________________)

SUMMARY FINAL ORDER

Considering the written and oral arguments, together with other pertinent matters of record, it is concluded that summary final order is appropriate under F.A.C. Rule 60Q-2.030.

PRELIMINARY STATEMENT

On April 8, 1996, the Petition to Determine Invalidity of Rules 59G-3.010(4), 59G-3.230(7)(f) [since renumbered 59G-3.230(6)(e)] and Portions of The Florida Medicaid Provider Reimbursement Handbook (specifically, pp. 4-1, 4-2, 4-4, 4-5 and 4-6 and Appendix A-34-35) was filed. The Reimbursement Handbook, HCFA-1500, Nov. 1994, is incorporated by reference in F.A.C. Rule 59G-3.230(8). Final hearing initially was scheduled for May 10, 1996.

On April 18, 1996, Petitioner's Motion to Establish Expedited Discovery Schedule was filed, and on April 22 the Respondent filed a Motion to Dismiss Petitioner's Request for an Administrative Proceeding, together with memorandum of law in support, on the ground that the Petitioner did not allege a sufficient factual basis for her standing to file the rule challenge.

On April 24, 1996, a telephone hearing was held on the Petitioner's Motion to Establish Expedited Discovery Schedule, which was resolved through entry of an Order Continuing Final Hearing to August 5, 1996, which also established a deadline for the Petitioner's written response to the motion to dismiss.

Discovery proceeded, and the Petitioner filed a Memorandum of Law in Response to Respondent's Motion to Dismiss. On May 18, 1996, an Order Denying Motion to Dismiss was entered.

Meanwhile, Florida Medical Association's Petition for Leave to Intervene was filed on May 3, 1996, and on May 6 an Order Granting Leave to Intervene was entered, subject to the ruling on any timely F.A.C. Rule 60Q-2.004 motion. No F.A.C. Rule 60Q-2.004 motion was filed.

On June 11, 1996, Petitioner's and Intervenor's Joint Motion for Summary Final Order and Statement of Undisputed Material Facts was filed in this case, together with a memorandum of law in support and a request for oral argument. On June 26, 1996, AHCA filed its response. Oral argument on the motion was held by telephone on July 8, 1996.

The Petitioner's and Intervenor's Motion to Amend Petitions to Determine Invalidity of Rules was filed on June 18, 1996. Although the motion referenced F.A.C. Rule 59G-3.320, attachments to the motion make it clear that the references to F.A.C. Rule 59G-3.320 were typographical errors and that the motion was to intended to amend the references in the petitions to F.A.C. Rule 59G-3.230(7)(f) to reflect recent renumbering to 59G-3.230(6)(e). (Emphasis added.) The motion to amend was granted without objection at the telephone hearing on July 8, 1996.

FINDINGS OF FACT

There is no genuine issue as to any of the following material facts:

1. The Petitioner is 78 years old and, since at least 1995, has been eligible for Medicare based on her age.

2. The Petitioner's monthly income is $594, and she has no assets or resources. Since at least 1995, she has been eligible for Medicaid based on her income and assets.

3. F.A.C. Rule 59G-3.010(4) provides:

> (b) Medicare Supplemental Insurance (Part B)
> 1. The monthly Medicare insurance premium is paid by the Agency directly to the Department of Health and Human Services for the Medicare and Medicaid eligible recipient.
> 2. The deductible and co-insurance under Part B, Medicare, are paid for the Medicare and Medicaid eligible recipient by the Medicaid fiscal agent. For physician services, Medicaid will cover the deductible and co-insurance only to the extent that the total payment received by the physician will not exceed the recognized Medicaid payment or, if there is no comparable Medicaid payment, 100 percent of the deductible and 75 percent of the co-insurance. In these situations, whether the physician did nor did not receive a payment from Medicaid, by billing Medicaid he is bound to the Medicaid payment schedule as payment in full.

4. F.A.C. Rule 59G-3.230(6)(e) provides:

> Payment Methodology for Covered Services.
>
> * * *

> (e) Services provided to individuals who are covered by both Medicare and Medicaid must be billed to Medicare first. Medicaid will consider payment of the deductible and coinsurance, but in no case shall the combined Medicare and Medicaid payments exceed the maximum allowable Medicaid amount for the procedure.

5. Pages 4-1, 4-2, 4-4, 4-5 and 4-6 and Appendix A-34-35 of The Florida Medicaid Provider Reimbursement Handbook, HCFA-1500, Nov. 1994, incorporated by reference in F.A.C. Rule 59G-3.230(8), contain language that essentially implements F.A.C. Rules 59G-3.010(4) and 59G-3.230(6)(e).

6. When rules on this subject initially were adopted on January 1, 1977, they did not include the challenged provisions. The challenged provisions were added by amendment adopted January 6, 1978. The preamble to the adopting rule's description of the impact of the challenged rules states that the rule "could . . . decrease . . . the number of physicians [and] result in Medicaid eligible individuals paying their own deductible and co-insurance, . . . changing physicians, or maintaining the same physician with the physician accepting a loss in income." (Fla. Admin. Weekly, Vol. 4, No. 1, Jan. 6, 1978, at 224-25.)

7. Some Florida physicians who accept other patients, including patients eligible for Medicare based on age but not eligible for Medicaid, do not accept "dual eligible" patients like the Petitioner (i.e., patients eligible for both Medicare and Medicaid) because the physician makes less money providing services for "dual eligible" patients under the terms of F.A.C. Rules 59G-3.010(4) and 59G-3.230(6)(e) and The Florida Medicaid Provider Reimbursement Handbook than the physician can make providing services for other patients, including patients eligible for Medicare based on age but not eligible for Medicaid.

8. In 1995, the Petitioner's physician required her to pay him fees for service in addition to the reimbursement he received from the Respondent under the terms of F.A.C. Rules 59G-3.010(4) and 59G-3.230(6)(e) and The Florida Medicaid Provider Reimbursement Handbook although those provisions as well as his agreement with the Respondent prohibit him from doing so. The Intervenor asserts that other Florida physicians participating the Medicaid program, likewise in violation of F.A.C. Rules 59G-3.010(4) and 59G-3.230(6)(e) and The Florida Medicaid Provider Reimbursement Handbook as well as their agreements with the Respondent, also "attempt to collect Medicare coinsurance and deductibles from patients who are indigent."

CONCLUSIONS OF LAW

9. Under Section 120.52(8)(c), Fla. Stat. (1995), a rule is an "[i]nvalid exercise of delegated legislative authority" if it "enlarges, modifies, or contravenes the specific provisions of law implemented."

10. Section 409.908, Fla. Stat. (1995), provides in pertinent part:

> Subject to specific appropriations, the agency shall reimburse Medicaid providers, [in accordance with state and federal law], according to methodologies set forth in the rules of the agency and in policy manuals and handbooks incorporated by reference therein.

* * *

> (13) Premiums, deductibles, and coinsurance for Medicare services rendered to Medicaid eligible persons shall be reimbursed in accordance with fees established by Title XVIII of the Social Security Act.

[Emphasis added.]

11. Until relatively recently, the Respondent reasonably believed that the challenged rules did not "enlarge, modify or contravene" the cited parts of Section 409.908. The challenged rules were approved by the federal Department of Health and Human Services (DHHS). But things changed with a series of federal court decisions in cases in other states, in which the federal DHHS and the respective state welfare agencies were aligned in defense of state regulatory provisions very similar to the rules challenged in this case and ultimately were on the losing side. Rehabilitation Ass'n of Virginia, Inc., v. Kozlowski, 42 F.3d 1444 (4th Cir. 1994), cert. den., ___ U.S. ___, 116 S.Ct. 60 (1995); Haynes Ambulance Service, Inc., v. State of Alabama, 36 F.3d 1074 (11th Cir. 1994); Pennsylvania Medical Society v. Snider, 29 F.3d 886 (3d Cir. 1994); New York City Health & Hospitals Corp. v. Perales, 954 F.2d 854 (2d Cir. 1992)(by divided vote, with dissenting opinion), cert. den., ___ U.S. ___, 113 S.Ct. 461, 121 L.Ed.2d 369 (1992). (Until the Kozlowski decision, the district court in each case had ruled in favor of DHHS and the state welfare agency.)

12. It would serve little purpose to try to explain the opinions of the federal circuit courts in this Summary Final Order. The Fourth Circuit was not exaggerating when it observed:

> There can be no doubt but that the statutes and provisions in question, involving the financing of Medicare and Medicaid, are among the most completely impenetrable texts within human experience. Indeed, one approaches them at the level of specificity herein demanded with dread, for not only are they dense reading of the most tortuous kind, but Congress also revisits the area frequently, generously cutting and pruning in the process and making any solid grasp of the matters addressed merely a passing phase.

Rehabilitation Ass'n of Virginia, Inc., v. Kozlowski, supra, at 1450. The various court opinions, some with dissenting opinions, are likewise difficult reading. For purposes of this Summary Final Order, it suffices to say that, in light of those decisions, it is clear that the challenged rules no longer can be viewed as being in accord with federal law. Under these decisions, Florida's rules cannot limit reimbursement for Medicare Part B premiums, deductibles and coinsurance for "dual eligibles" like the Petitioner, or for "pure" Medicare "qualified medical beneficiaries," to the maximum Medicaid rate; rather, those items must be reimbursed fully, subject only to the possibility of nominal charges under 42 U.S.C. s. 1396o. Cf. Kozlowski, supra, at 1458-1459. Those wanting more detail and "willing to plunge into the morass," can try reading the court opinions. Cf. Kozlowski, supra, at 1458 (referring to the facial ambiguities in the federal statutes in question).

13. Medicaid payment of a person's Medicare Part B premiums, deductibles and coinsurance is a benefit under federal law; Florida's rules refusing to pay those items to the extent that they exceed the Medicaid rate take away part of the federal benefit and directly affect a "dual eligible" patient like the Petitioner. Even if Medicaid payment of Medicare Part B premiums, deductibles and coinsurance could be viewed strictly as reimbursement to physician(s), instead of a benefit to "dual eligibles" like the Petitioner, it is undisputed that the challenged rules reduce the number of physicians willing to serve "dual eligibles." Even the preamble to the adopting rule's description of the impact of the challenged rules states that the rules "could . . . decrease . . . the number of physicians [and] result in Medicaid eligible individuals . . . changing physicians . . .." (Fla. Admin. Weekly, Vol. 4, No. 1, Jan. 6, 1978, at 224-25.) It is concluded that the impact which the challenged rules have on the Petitioner are sufficient to support her standing to bring this challenge. See Dept. of Prof. Reg. v. Dental Hygienist, 612 So. 2d 646, 651 (Fla. 1st DCA 1993).

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, the Petitioner's and Intervenor's Joint Motion for Summary Final Order is granted, and F.A.C. Rules 59G-3.010(4) and 59G-3.230(6)(e), together with implementing language on pages 4-1, 4-2, 4-4, 4-5 and 4-6 and Appendix A-34-35 of The Florida Medicaid Provider Reimbursement Handbook, HCFA-1500, Nov. 1994, incorporated by reference in F.A.C. Rule 59G-3.230(8), are held invalid.

DONE AND ENTERED this 17th day of July, 1996, in Tallahassee, Florida.

____
J. LAWRENCE JOHNSTON, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of July, 1996.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

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MOTION TO CORRECT SUMMARY FINAL ORDER
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IRENE REYNOLDS,

Petitioner,

FLORIDA MEDICAL ASSOCIATION,

Intervenor,

vs. CASE NO. 96-1682RX

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
________________________________/

MOTION TO CORRECT SUMMARY FINAL ORDER

Comes now undersigned counsel for Petitioner, pursuant to Fla. Admin Code R. 60Q-2032, and filed this motion for correction of the rule referenced in the July 17, 1996 Summary Final Order as "59G-3.230(6)(e)". The correct number of the rule is 59G-4.230(6)(e)

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by regular mail on this 19th day of July, 1996 to Moses Williams of Agency for Health Care Administration, Medicaid Legal Department, 2727 Mahan Drive, Building 31 Fort Knox executive Center, Tallahassee, Florida 3230 and to Christopher Nuland, Esquire, 760 Riverside Avenue Jacksonville, Florida 32204

____
MIRIAM HARMATZ

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MOTION FOR REHEARING
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IRENE REYNOLDS,

Petitioner,

FLORIDA MEDICAL ASSOCIATION,

Intervenor,
vs.   CASE NO. 96-1682RX

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Respondent.
_______________________________/

MOTION FOR RE-HEARING

COMES NOW Respondent, STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION, and moves the Hearing Officer for a rehearing pursuant to FAC Rule 60Q-2.016 on the Summary Final Order dated July 17, 1996, and states in support of this Motion as follows:

1. Petitioner has conceded by motion dated July 19, 1996, that the Summary Final Order contains substantial errors: FAC Rule 59G-3.230(6)(e) is not the subject of this proceeding as indicated throughout the Summary Final Order.

2. Respondent has filed a Motion to Dismiss Florida Medical Association's Petition to Intervene, to which the Hearing Officer has yet to respond.

3. Attached to this Motion for Rehearing is Respondent's Request for Oral Argument on Petitioner's and Respondent's Oral Argument on Petitioner's and Respondent's Outstanding Motions.

Respectfully submitted,

____

MOSES E. WILLIAMS
Senior Attorney
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Agency for Health Care Administration
Office of the General Counsel
2727 Mahan Drive
Tallahassee, Florida 32308-5403
(904) 922-5873

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing has been furnished by U.S. Mail to CHRISTOPHER NULAND, Esquire, 760 Riverside Avenue, Jacksonville, Florida 32204, and MIRIAM HARMATZ, Esquire, Florida Legal Services, Inc., Miami Advocacy Office, 3000 Biscayne Boulevard, Suite 450, Miami, Florida 33137 this 25th day of July 1996.

____

Moses E. Williams, Esquire

===

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR REHEARING

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IRENE REYNOLDS,

Petitioner,

vs. CASE NO. 96-1682RX

FLORIDA MEDICAL
ASSOCIATION, INC.,

Intervenor,

vs.

STATE OF FLORIDA/AGENCY FOR
HEALTH CARE ADMINISTRATION,

Respondent.
____________________________________/

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR REHEARING

Comes now Petitioner's counsel and files the following response:

1. Respondent's Motion is improper based on Fla. Admin. Code R. 60Q-2.032(3). That rule specifies that "[n]o motion for rehearing shall be addressed to any recommended order or final order issued by a Hearing Officer.

2. Respondent's argument that Petitioner has "conceded . . that the Final Order contains substantial errors", is a blatant mischaracterization of Petitioner's Motion to Correct Summary Final Order. That motion was directed to correct an error in the numerical designation of one of the challenged rules, an error which can only be characterized as clerical. Petitioner's motion in no way concedes "substantial" errors in the order.

Based upon the above, Petitioner requests that the Hearing Officer dismiss Respondent's Motion for Re-Hearing.

Respectfully submitted,

By__________________________________

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by regular mail on this 31st day of July, 1996 to Moses Williams of Agency for Health Care Administration, Medicaid Legal Department, 2727 Mahan Drive, Building 3, Fort Knox Executive Center, Tallahassee, Florida 32308 and by regular mail to Christopher Nuland, Esquire, 760 Riverside Avenue, Jacksonville, Florida 32204.

____
MIRIAM HARMATZ

===
DOAH ORDER CORRECTING SUMMARY FINAL ORDER
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IRENE REYNOLDS,

Petitioner,

and

FLORIDA MEDICAL ASSOCIATION, INC.,

vs. CASE NO. 96-1682RX

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.

ORDER
CORRECTING SUMMARY FINAL ORDER

On July 19, 1996, the Petitioner filed a Motion to Correct Summary Final Order; on July 29, 1996, the Respondent filed a Motion for Re-Hearing. The Respondent also requests a ruling on its Motion to Dismiss Florida Medical Association's Petition for Leave to Intervene filed on July 17, 1996.

The Petitioner's Motion to Correct Summary Final Order is granted, and the mistaken citations to F.A.C. Rule 59G-3.230 are corrected to read F.A.C. Rule 59G-4.230. F.A.C. Rule 60Q-2.032.

The Respondent's Motion for Re-Hearing is denied. Id.

The Respondent's Motion to Dismiss Florida Medical Association's Petition for Leave to Intervene, which was filed on the day of entry of Summary Final Order, is denied as untimely.

DONE and ORDERED this 6th day of August, 1996, in Tallahassee, Florida.

J. LAWRENCE JOHNSTON
Hearing Officer
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Filed with the Clerk of the
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