

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE , )  
ADMINISTRATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 03-2530MPI  
 )  
LOVE AND CARE PHARMACY, INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tallahassee, Florida, on September 22, 2003.

APPEARANCES

For Petitioner: Grant P. Dearborn  
Assistant General Counsel  
Building 3, Mail Stop 3  
2727 Mahan Drive  
Tallahassee, Florida 32308-5407

For Respondent: No appearance

STATEMENT OF THE ISSUE

The issue is whether Petitioner overpaid Respondent Medicaid funds, for which Section 409.913(10), Florida Statutes (2002), authorizes Petitioner to seek repayment from Respondent.

PRELIMINARY STATEMENT

By letter dated April 8, 2002, Petitioner advised Respondent that it had completed an audit of paid Medicaid claims from January 1, 1998, through December 31, 1998 and had determined that Petitioner had overpaid Respondent \$1,096,489.77. Respondent timely requested a formal hearing.

On August 27, 2003, Petitioner filed a Motion to Compel Discovery, For Sanctions, and To Deem Admissions Admitted. On September 19, 2003, the Administrative Law Judge entered an Order Granting Motion to Deem Admitted Requests for Admission and Granting Motion to Exclude Documents.

On September 19, 2003, Respondent filed an Emergency Motion to Stay Proceedings and Supporting Memorandum seeking an abatement of this case until the resolution of a pending criminal case involving the same matter. On the same day, the Administrative Law Judge entered an Order denying the motion. After the close of business on the same day, Respondent's counsel faxed a letter to the Administrative Law Judge, with a copy to opposing counsel, advising that his "clients" had instructed him not to appear at the final hearing in this case and restating his "clients'" reassertion of their Fifth Amendment rights. Respondent's counsel offered to appear at the hearing, but only to restate the matters contained in the motion and letter.

At the hearing, Petitioner called one witness and offered into evidence six exhibits: Petitioner Exhibits 1-4, 6, and 8. At the request of Petitioner, the Administrative Law Judge also took official notice of, and admitted, Petitioner Exhibits 7 and 9-16. Respondent did not appear at the hearing.

The court reporter filed the transcript on October 15, 2003. Petitioner filed a Proposed Recommended Order on September 29, 2003. Respondent did not file a proposed recommended order.

#### FINDINGS OF FACT

1. During 1998, Respondent was an authorized Medicaid provider, pursuant to Medicaid provider number 105425200, and was a party to a valid Medicaid Provider Agreement with Petitioner. Respondent filed claims with Petitioner for payment, under the Medicaid program, for the goods and services that are the subject of the audit described below, and Petitioner paid Respondent for these claims.

2. The audit period in this case is 1998. During 1998, Respondent submitted to Petitioner 36,257 claims for nearly 5.5 million units of over one thousand types of drugs. These claims totaled \$3,075,449.88, which Petitioner paid Respondent.

3. On June 2, 1999, Petitioner sent a letter to Respondent informing it of a review of its pharmacy claims for 1998. The letter requests documentation of all purchases of 12 named drugs

for 1998 and documentation of all credits for these drugs during the same period. The letter states that acceptable documentation includes itemized wholesaler sales history reports, itemized manufacturer sales history reports, itemized invoices, and credit return receipts. By letter dated June 5, 1999, Respondent provided the requested information.

4. By letter dated June 23, 2000, Petitioner advised Respondent that it had examined the paid Medicaid claims for 1998 and the acquisition documentation that Respondent had provided in June 1999. The letter states: "You have failed to provide adequate documentation to the effect that the available quantity of certain drugs of given strength was as great as the quantity of those drugs billed to and reimbursed by Medicaid." Thus, Petitioner made a "provisional" determination that it had overpaid Respondent \$1,092,205.32. The letter invites Respondent to provide additional information to reduce the overpayment determination.

5. The June 23 letter contains an Overpayment Attachment that lists ten of the twelve drugs for which Petitioner had sought documentation in its earlier letter. For each of these ten drugs, the Overpayment Attachment lists the generic code, number of units for which Medicaid paid, the total amount of Medicaid payments, the total units documented by Respondent to have been available during the relevant period, and the number

of units for which Respondent provided no availability documentation. The Overpayment Attachment also calculates the amount of Medicaid payments attributable to the unavailable units and the total overpayment, which is \$1,092,205.32.

6. The overpayment calculations described in the preceding paragraph assume that all available units of the audited drugs were sold to Medicaid patients. The effect of this improbable scenario reduces the amount of the overpayment. The overpayment calculations attempt no extrapolation of overpayments on the over 10,000 other drugs for which Respondent received Medicaid payments during 1998. The effect of limiting the overpayment calculation to the ten listed drugs reduces the amount of the overpayment. However, the ten listed drugs are the drugs that generated the most Medicaid payments to Respondent and account for over one-third of the total Medicaid payments during the relevant period.

7. Respondent provided additional information to Petitioner on August 30 and November 3, 2000. However, after examining the information, Petitioner advised Respondent, by letter dated April 8, 2002, that its final determination was that Respondent owed \$1,096,489.77 due to its receipt of Medicaid overpayments. The overpayment increased by over \$4000 due to the determination that Respondent's records documented

1000 fewer available units of two dosages of Risperdone than Petitioner had previously determined.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes (2002).)

9. Section 409.913(10) authorizes Petitioner to "require repayment for inappropriate, medically unnecessary, or excessive goods or services from the person furnishing them, the person under whose supervision they were furnished, or the person causing them to be furnished."

10. Section 409.913(14)(n) provides that Petitioner may seek any remedy available provided by law if the "provider fails to demonstrate that it had available during a specific audit or review period sufficient quantities of goods . . . to support the provider's billings to the Medicaid program."

11. Section 409.913(20) directs Petitioner to prepare and issue an audit report when making a determination of an overpayment. Section 409.913(21) provides that the audit report is "evidence of the overpayment" and limits certain evidence in opposition to the audit report to documentary evidence that has been exchanged at least two weeks prior to the hearing. Section 409.913(1)(e) defines an "overpayment" as "any amount that is

not authorized to be paid by the Medicaid program whether paid as a result of inaccurate or improper cost reporting, improper claiming, unacceptable practices, fraud, abuse, or mistake."

12. Section 409.913(8) requires Medicaid providers to maintain all business, medical, and financial records pertaining to Medicaid-paid goods and services for five years.

13. Section 409.913(24)(b) provides for interest at the annual rate of ten percent from the date of Petitioner's determination of overpayment on the amount of the overpayment.

14. Petitioner has proved that Respondent owes Petitioner \$1,096,489.77 in Medicaid overpayments that it has received, plus interest at the annual rate of ten percent from April 8, 2002. These are the sole remedies that Petitioner seeks in this case.

#### RECOMMENDATION

It is

RECOMMENDED that the Agency for Health Care Administration enter a final order directing Respondent to pay Petitioner \$1,096,489.77, plus interest, to repay overpayments that it received from the Medicaid program for the sale of drugs in 1998.

DONE AND ENTERED this 3rd day of November, 2003, in  
Tallahassee, Leon County, Florida.

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ROBERT E. MEALE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 3rd day of November, 2003.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.