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STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

COMSCRIPT, INC. d/b/a
COMSCRIPT,

Petitioner,

v.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

JDP Closed

DOAH CASE NO. 03-3238MPI
(formerly DOAH CASE NO. 01-1970MPI)
AHCA AUDIT NO. CI 01-0514-000-3
AHCA RENDITION NO.

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DIVISION OF ADMINISTRATIVE HEARINGS

FINAL ORDER

This cause was referred to the Division of Administrative Hearings and assigned to an Administrative Law Judge (ALJ) for a formal administrative hearing and the entry of a Recommended Order. The Recommended Order of October 6, 2005, is attached to this Final Order and incorporated herein by reference.

RULING ON EXCEPTIONS

Petitioner filed exceptions to which the Agency did not file a response. The Agency did not file any exceptions.

In Exception No. 1, Petitioner took exception to the Conclusion of Law in Paragraph 48 of the Recommended Order, arguing that, contrary to the Findings of Fact in Paragraphs 17 and 29 of the Recommended Order, the Petitioner did maintain records to support drugs dispensed and was able to produce those records in written form. However, the findings of fact in Paragraphs 17 and 29 of the Recommended Order were based on competent substantial evidence. See Transcript, Volume I, Page 52; Transcript, Volume 2, Pages 113-115, 117, 140-141, 184, 202-203, and 210-211; Transcript, Volume III, Pages 249-252, 256, 269-270, 286-287, and 336.

Furthermore, the Conclusion of Law in Paragraph 48 of the Recommended Order was based on the Findings of Fact in Paragraphs 17 and 29 of the Recommended Order, as well as the deposition testimony of John Taylor, which was also a part of the record in this case. See Transcript of Deposition of John Taylor, Pages 15, 18-19, 28-30, 41, and 55-56. The Petitioner is, in essence, asking the Agency to re-weigh the evidence, which it cannot do. See Barfield v. Department of Health, 805 So.2d 1008 (Fla. 1st DCA 2001). Therefore, Petitioner's Exception No. 1 is denied.

In Exception No. 2, Petitioner took exception to the Finding of Fact in Paragraphs 33 and 35 of the Recommended Order, arguing they were unsupported by record evidence; and the Conclusion of Law in Paragraph 48 of the Recommended Order, stating it was erroneous. According to Petitioner, the Recommended Order did not state what required "format" a prescription is to be kept in, and that there is no required "format". However, the Findings of Fact in Paragraphs 33 and 35 were supported by competent substantial evidence. There was ample record testimony as to in what "format" Petitioner's prescription record should have been kept. See, e.g., Transcript of Deposition of John Taylor, Pages 14-15, 29, 40-41, and 54-56. Thus, the Agency cannot overturn the Findings of Fact in Paragraphs 33 and 35. See, generally, § 120.57(1)(*l*), Fla. Stat. (providing in pertinent part that "[t]he agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record . . . that the findings of fact were not based upon competent substantial evidence"); Heifetz v. Department of Bus. Regulation, 475 So.2d 1277, 1281 (Fla. 1985) (holding that an agency "may not reject the hearing officer's finding [of fact] unless there is no competent, substantial evidence from which the finding could reasonably be inferred"). The Conclusion of Law in Paragraph 48 of the Recommended Order was based on the Findings of Fact in Paragraphs 33 and 35, as well

as the Findings of Fact in Paragraphs 17 and 29 of the Recommended Order, which in turn were all based on competent substantial evidence, as noted supra. Even though the Agency has substantive jurisdiction over this area, the Agency could not substitute a conclusion of law as or more reasonable than that of the ALJ. Therefore, Petitioner's Exception No. 2 is denied.

In Exception No. 3, Petitioner took exception to Paragraph 38 of the Recommended Order, arguing it was unsupported by the record. According to Petitioner, contrary to the ALJ's finding, there was sufficient documentation that was produced to the Agency to support at least some of the refills at issue. However, the ALJ's finding was not that the documentation was not produced, but that it was not documented in the required format. There was competent substantial evidence in the record to support this finding. See, e.g., Transcript, Volume II, Pages 115-117, and 191-192. Thus, the Agency cannot overturn the ALJ's finding. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Petitioner's Exception No. 3 is denied.

In Exception No. 4, Petitioner took exception to the Recommended Order in general, arguing it did not consider the effect of the Uniform Electronic Transactions Act. Petitioner also took exception to the Conclusion of Law in Paragraph 49 of the Recommended Order, arguing it did maintain a data processing system that permitted electronic retention of records, and it did maintain prescriptions that had been reduced to writing contemporaneously with the order. As to Petitioner's exception to the Recommended Order in general, Petitioner did not clearly identify which portions of the Recommended Order it disputed. Section 120.57(1)(k), Florida Statutes (2005), states "an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Additionally, Petitioner's argument is flawed for two reasons. First, the Uniform Electronic

Transactions Act applied "to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after July 1, 2000." See Section 668.50(4), Florida Statutes (2000). The records at issue in the Agency audit were "created, generated, sent, communicated, received, or stored" from May 28, 1999, to July 18, 2000. So, at most, the Uniform Electronic Transactions Act would only be applicable to any audited prescriptions generated from July 1, 2000, to July 18, 2000. Second, the Uniform Electronic Transactions Act "does not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction." See Section 668.50(12)(g), Florida Statutes (2000). Thus, even if the Uniform Electronic Transactions Act applied to any audited prescriptions generated from July 1, 2000, to July 18, 2000, the Act itself allowed the Agency to mandate that the Petitioner keep a record of those prescriptions in accord with the Medicaid recordkeeping requirements, notwithstanding the fact that the Petitioner had an electronic copy of them in its computer system. Therefore, the Petitioner's general exception to the Recommended Order is denied. As for Petitioner's exception to the Conclusion of Law in Paragraph 49 of the Recommended Order, that conclusion of law was based on competent substantial evidence (See, e.g., Transcript, Volume 2, Pages 113-115, 117, 140-141, 184, and 202-203; Transcript, Volume III, Pages 249-252, 269-270, and 286-287; and Transcript of Deposition of John Taylor, Page 41.), and, even though the Agency has substantive jurisdiction over this area, the Agency cannot substitute a conclusion of law that is as or more reasonable than that of the ALJ. Therefore, Petitioner's Exception No. 4 is denied.

In Exception No. 5, Petitioner took exception to the Findings of Fact in Paragraphs 6 and 32 of the Recommended Order as being erroneous, arguing that the information kept by the Petitioner in its computer system complied with the Medicaid recordkeeping requirements.

However, there was competent substantial evidence to support the Findings of Fact in Paragraphs 6 and 32 of the Recommended Order. See Respondent's Exhibits 22-26; Transcript, Volume II, Page 204; Transcript, Volume III, Pages 331-335; and Transcript of Deposition of John Taylor, Pages 41-44. The Petitioner again is, in essence, asking the Agency to re-weigh the evidence, which it cannot do. See Barfield. Therefore, Petitioner's Exception No. 5 is denied.

In Exception No. 6, Petitioner took exception to the Conclusion of Law in Paragraph 50 of the Recommended Order, arguing it was erroneous and that the Petitioner was denied due process when the Agency "changed record keeping requirements without notice." However, there was ample competent substantial record evidence to support the ALJ's conclusion that the Petitioner did not comply with the Medicaid recordkeeping requirements. See Transcript, Volume I, Page 52; Transcript, Volume 2, Pages 113-115, 117, 140-141, 184, 202-203, and 210-211; Transcript, Volume III, Pages 249-252, 256, 269-270, 286-287, and 336; Respondent's Exhibits 22-26; and Transcript of Deposition of John Taylor, Pages 14-15, 29, 40-41, and 54-56. Even though the Agency has substantive jurisdiction over this area, the Agency cannot substitute a conclusion of law that is as or more reasonable than that of the ALJ. Therefore, Petitioner's Exception No. 6 is denied.

In Exception No. 7, Petitioner took exception to the Recommended Order in general, stating that it made no findings or conclusions with regard to the alleged absence of DEA numbers on orders, and asserting that Petitioner was in compliance with the requirements that a doctor's DEA number and address appear on an order. Petitioner also argued that Paragraph 28 of the Recommended Order was erroneous. As to Petitioner's exception to the Recommended Order in general, Petitioner did not clearly identify which portions of the Recommended Order it disputed. Therefore, the Agency declines to rule on it. See Section 120.57(1)(k), Florida

Statutes (2005). As to Petitioner's exception to Paragraph 28 of the Recommended Order, there was competent substantial evidence to support the Findings of Fact in Paragraph 28 of the Recommended Order. See, e.g., Transcript, Volume II, Page 195; and Transcript, Volume III, Page 253. Therefore, Petitioner's Exception No. 7 is denied.

In Exception No. 8, Petitioner took exception to the Conclusion of Law in Paragraph 51 of the Recommended Order, in that it objected to the use of statistical sampling and extrapolation to calculate the overpayment at issue in this case. Petitioner argued that Section 465.188, Florida Statutes (2004), prohibited the Agency from using extrapolation to calculate the overpayment at issue in this case because its requested overpayment in this case was actually a "penalty" imposed on the Petitioner for not following what the Agency deemed to be acceptable procedure under the Medicaid provider agreement. However, the Petitioner's argument is erroneous and contrary to existing caselaw. First, the ALJ's conclusion was based on prior precedent, namely the case of Colonial Cut-Rate Drugs v. AHCA, wherein the ALJ in that case concluded that

> the "audit criteria" set forth in Section 465.188, Florida Statutes, as amended by Chapter 2004-344, Laws of Florida, including the requirement that "[a] finding of an overpayment . . . must be based on the actual overpayment . . . and may not be a projection," are inapplicable. Furthermore, employing the "accounting practice of extrapolation" in calculating the amount of any overpayment is not prohibited by the second sentence of Subsection (1)(k) of the current version of Section 465.188 since the recovery of an overpayment (that is, monies the provider should not have received from AHCA in the first place) is not a penalty.

See Recommended Order in Colonial Cut-Rate Drugs v. AHCA, DOAH Case No. 03-1547MPI at Page 66 (adopted in toto by Agency Final Order rendered on May 26, 2005).

This conclusion is also supported by caselaw on statutory interpretation. It is well-settled that legislative intent must be determined primarily from the language of the law itself. State v. Rife, 789 So.2d 299 (Fla. 2001); Miele v. Prudential-Bache Securities, Inc., 656 So.2d 470 (Fla.

1995); and City of Tampa v. Thatcher Glass Corp., 445 So.2d 578 (Fla. 1984). Furthermore, where there is no ambiguity in the language of the statute, "we need look no further than the statute itself." Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879, 882 (Fla. 1983). The language of Section 465.188, Florida Statutes (2004), is quite clear in stating that, notwithstanding the fact that the Agency can use extrapolation in auditing claims prior to July 11, 2003 to assess overpayments, extrapolation cannot be used by the Agency in assessing penalties. Section 409.913(1)(e), Florida Statutes, 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." In addition to recovering overpayments, Section 409.913(16), Florida Statutes, allows the Agency to impose "sanctions", or penalties, on Medicaid providers for violating provisions of the Medicaid provider handbook as enumerated in Section 409.913(15), Florida Statutes. However, the terms "overpayment" and "sanctions" are not used interchangeably within the statute, nor could the term "overpayment" be construed to mean "penalty" as the Petitioner argued. When the Agency is seeking to recover an overpayment, it is only pursuing funds that should have not been paid to the provider in the first place. See The Doctor's Office d/b/a the Children's Office v. Agency for Health Care Administration, 26 FALR 4549, 4560 (AHCA 2004). In contrast, a "penalty" has been variously defined as "a sum of money which the law exacts payment of by way of punishment for doing some act which is prohibited or for not doing some act which is required to be done", or "a statutory liability imposed on [a] wrongdoer in [an] amount which is not limited to damages suffered by [the] party wronged." Sun Coast Int'l, Inc. v. Dep't of Business Regulation, Div. of Florida Land Sales, Condominiums and Mobile Homes, 596 So.2d 1118, 1121 (Fla. 1st DCA 1992) (quoting Black's Law Dictionary,

1133 6th ed. 1990). The Legislature's use of the term "penalties" in section 465.188(1)(k), Florida Statutes, (2004), demonstrated the Legislature did not intend to prohibit the Agency from using statistical methods to calculate overpayments associated with claims submitted before July 11, 2003. If the Legislature had intended otherwise, then it would have used the term "overpayments" in subsection (1)(k) just as it did in subsection (1)(e) which provides that "[a] finding of an overpayment or underpayment must be based on the actual overpayment or underpayment and may not be a projection based on the number of patients served having a similar diagnosis or on the number of similar orders or refills for similar drugs." §465.188(1)(e), Fla. Stat. (2004) (emphasis added). Indeed, when the Legislature uses a term in one section of the statute but omits it in another section of the same statute, courts will not imply it where it has been excluded. Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So.2d 911, 914 (Fla. 1995). See also St. George Island, LTD. v. Rudd, 547 So.2d 958, 961 (Fla. 1st DCA 1989) (noting "the presence of a term in one portion of a statute and its absence from another argues against reading it as implied by the section from which it is omitted."). Moreover, "[t]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." State v. Mark Marks, P.A., 698 So.2d 533, 541 (Fla. 1997) (quoting Dep't of Professional Regulation v. Durrani, 455 So.2d 515, 518 (Fla. 1st DCA 1984)).

In addition, given the total prohibition against the use of statistical methods in calculating overpayments imposed by the 2003 version of Section 465.188, Florida Statutes, it must be presumed the Legislature intended to change the state of the law through the 2004 amendment. After the First District Court of Appeals held in State, Agency for Health Care Administration v. Colonial Cut-Rate Drugs, 878 So.2d 479 (Fla. 1st DCA 2004), that Section 465.188, Florida Statues, was a procedural statute and thus applied to pending cases, there can be no argument

that the 2003 version of the statute prohibited the Agency from using statistical methods to calculate overpayments associated with claims submitted before or after July 11, 2003. But, because the 2004 amendment restricted the audit criteria of Section 465.188(1), Florida Statutes, to "audits of claims submitted for payment subsequent to July 11, 2003," the Legislature must have intended to alter the law in order to allow the Agency to use statistical methods to calculate overpayments associated with claims submitted before July 11, 2003. See Sam's Club v. Bair, 678 So.2d 902, 903 (Fla. 1st DCA 1996) (noting that "by enacting a material amendment to a statute, the legislature is presumed to have intended to alter the law unless the contrary is made clear."). If the situation were otherwise, then the 2004 amendment would be superfluous language rather than an alteration to the law.

Furthermore, according to another rule of statutory construction, it is very likely the 2004 amendment to Section 465.188, Florida Statutes, was the Legislature's reaction to ALJ's initial decision in Colonial that allowing the Agency to use statistical extrapolation after July 11, 2003 "would clearly thwart the will of the legislature." See Order on Pending Motions at Page 28, DOAH Case No. 03-1547MPI (filed August 25, 2003). "Florida's well settled rule of statutory construction is that the legislature is presumed to know the existing law when a statute is enacted, including judicial decisions on the subject concerning which it subsequently enacts a statute." Seagrave v. State, 802 So.2d 281, 290 (Fla. 2001). See also City of Hollywood v. Lombardi, 770 So.2d 1196, 1202 (Fla. 2000) (noting "the legislature is presumed to know the judicial constructions of a law when enacting a new version of that law."); Bidon v. Dep't of Prof'l Regulation, Florida Real Estate Comm'n, 596 So.2d 450, 452 (Fla. 1992) (holding that "[f]or purposes of ascertaining the legislative intent in limiting reimbursement under the subsection, the legislature is presumed to have been aware of the case law excluding attorney's

fees from the recovery of actual or compensatory damages."). Therefore, in order to enable the Agency to take action on audits that complied with the law at the time they were conducted, it is entirely reasonable to conclude the Legislature amended Section 465.188, Florida Statutes, in 2004 so that the ten audit criteria in Section 465.188(1) would only apply "to audits of claims submitted for payment subsequent to July 11, 2003."

Therefore, the ALJ's Conclusion of Law in Paragraph 51 of the Recommended Order was a reasonable interpretation of the statutes, and, even though the Agency has substantive jurisdiction over this area, the Agency cannot substitute a conclusion of law that is as or more reasonable than that of the ALJ. Based upon the foregoing, Petitioner's Exception No. 8 is denied.

In Petitioner's second Exception No. 8, Petitioner took exception to the Conclusion of Law in Paragraph 52 of the Recommended Order, arguing that it was unsupported by law or fact; and the Finding of Fact in Paragraph 25 of the Recommended Order, wherein the ALJ found the testimony of Dr. Johnson to be credible and persuasive. The Petitioner argued the ALJ ignored the testimony of its expert witness regarding the use of extrapolation by the Agency in calculating the overpayment at issue in this case. In making the Finding of Fact in Paragraph 25 of the Recommended Order, and the Conclusion of Law in Paragraph 52 of the Recommended Order, the ALJ weighed the credibility of the testimony by the Agency's expert witness, Dr. Johnson, and the Petitioner's expert witness, Dr. Intriligator. In taking exception to Paragraphs 25 and 52 of the Recommended Order, the Petitioner is again, in essence, asking the Agency to re-weigh this record evidence in order to making findings and conclusions more favorable to its position. This it cannot do. See Barfield. Therefore, Petitioner's second Exception No. 8 is denied.

Petitioner's Exception Nos. 9, 10, and 11 were based on its Exception Nos. 1-8, which were denied. Therefore, Petitioner's Exception Nos. 9, 10, and 11 are also denied.

FINDINGS OF FACT

The Agency adopts the findings of fact set forth in the Recommended Order.

CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Recommended Order.

IT IS THEREFORE ADJUDGED THAT:

Petitioner is required to repay $216,974.07 in Medicaid overpayments to the Agency. Petitioner shall make full payment of the monies, totaling $216,974.07, to the Agency for Health Care Administration within 30 days of the rendition of this Final Order. Petitioner shall pay by check payable to the Agency for Health Care Administration and mailed to the Agency for Health Care Administration, Office of Finance and Accounting, 2727 Mahan Drive, Fort Knox Building 2, Mail Stop 14, Tallahassee, Florida 32308.

DONE and ORDERED this 9 day of December, 2005, in Tallahassee, Florida.

ALAN LEVINE, Secretary
AGENCY FOR HEALTH CARE ADMINISTRATION

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY ALONG WITH THE FILING FEE PRESCRIBED BY LAW WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U.S. or interoffice mail to the persons named below on this 14th day of December, 2005.

RICHARD J. SHOOP, Agency Clerk
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