3-25-05

FILED
05 MAY 27 PM 1:58

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

HENRY LEPELY, M.D.,

Petitioner,

vs.

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

DOAH CASE NO. 04-3025MPI
AHCA AUDIT NO. C.I. 99-0483-000
AHCA RENDITION NO. SFH
Closed

AT

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 March 25, 2005, is attached to this Final Order and incorporated herein by reference.

RULING ON EXCEPTIONS

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

Petitioner excepted to the findings of fact in Paragraph 21 of the Recommended Order arguing it assumed the Petitioner received no credit for the evaluation when, in fact, the audits by the Agency allowed reimbursement. Petitioner also stated the statistical analysis by extrapolation is inconsistent with the practice of the Respondent in permitting credit for seeing some patients at an ACLF. However, Petitioner's argument is erroneous. Nowhere in Paragraph 21 of the Recommended Order does it state or imply Petitioner received no credit for the evaluations conducted at ACLFs. To the contrary, Paragraph 21 of the Recommended Order states "[i]nstead of entirely denying the claims for ACLF patients, Respondent gave Petitioner

credit for providing a lower level of service in a custodial care facility." Further, Paragraph 21 does not address the validity of the statistical analysis by extrapolation. Thus, the Agency cannot reject the finding of fact in Paragraph 21 based on the Petitioner's argument. 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"). Therefore, Petitioner's exception to Paragraph 21 of the Recommended Order is denied.

Petitioner excepted to the findings of fact in Paragraph 22 of the Recommended Order stating the cluster sample was supposed to represent a homogeneous group, when in fact, the cluster sample was not homogeneous and, therefore, the extrapolation was invalid. However, there was competent, substantial evidence to support the ALJ's findings. See Respondent's Exhibit 27. Therefore, Petitioner's exception to the findings of fact in Paragraph 22 of the Recommended Order is denied.

Petitioner excepted to the findings of fact in Paragraphs 26 and 27 of the Recommended Order arguing there was no independent determination of overpayment as required by statute because the predetermination made by the Agency's in-house peer reviewer was submitted to the statistical analyst and outside reviewer, who relied on it in making their determinations. However, Petitioner offered no legal basis for, or citations to the record in support of, this exception. See § 120.57(1)(*k*), Fla. Stat. As pointed out by the Agency in its response to the Petitioner's exceptions, there was nothing in the record to indicate the Agency used an "in-house

reviewer" to make any determinations. In contrast, there is competent, substantial evidence to show that an independent determination was made by an outside consultant in accordance with the statute. See Respondent's Exhibit 26, Pages 10-16, 18, and 32-33. Petitioner further excepted to the findings of fact in Paragraph 27 stating Art Williams, who Petitioner contended did some of the peer reviewing, was not a registered nurse or had medical qualifications though he was employed by AHCA. Again, Petitioner did not make any citation to the record in support of this exception. See § 120.57(1)(*k*), Fla. Stat. Further, there is competent substantial evidence to support the ALJ's findings. See Transcript, Volume I, Pages 42 and 95-99. Therefore, Petitioner's exceptions to the findings of fact in Paragraphs 26 and 27 of the Recommended Order are denied.

Petitioner excepted to the findings of fact in Paragraph 29 of the Recommended Order stating the outside reviewer relied upon Mr. Williams' changes. Petitioner did not offer any citations to the record in support of this exception (See § 120.57(1)(*k*), Fla. Stat.). Further, there was competent substantial evidence to support the ALJ's findings. See Respondent's Exhibit 26, Pages 10-16, 18, 32-33 and 37-38. Therefore, Petitioner's exception to the findings of fact in Paragraph 29 of the Recommended Order is denied.

Petitioner excepted to the findings of fact in Paragraphs 30, 31, and 32 of the Recommended Order stating Dr. Agbunag presented no testimony concerning her peer review, and there was no substantial evidence before the ALJ to substantiate the findings. However, there was competent substantial evidence to support the findings of fact in those paragraphs. See Respondent's Exhibit 5; and Transcript, Volume I, Pages 35-36, 38-41, 48-50, 67-68, and 73. Therefore, Petitioner's exception to the findings of fact in Paragraphs 30, 31 and 32 of the Recommended Order is denied.

Petitioner excepted to the findings of fact in Paragraph 36 of the Recommended Order stating the evidence showed there were missing samples from the cluster, yet the Agency relied upon these for a valid statistical determination, which invalidated the extrapolation. Petitioner again failed to offer any citations to the record in support of its exception (See § 120.57(1)(*k*), Fla. Stat.). Additionally, there was competent substantial evidence to support the ALJ's findings. See Transcript, Volume III, Pages 375-399. Therefore, Petitioner's exception to the findings of fact in Paragraph 36 of the Recommended Order is denied.

Petitioner excepted to the findings of fact in Paragraph 38 of the Recommended Order, stating there was no valid testimony that Dr. Agbunag did not change her opinion prior to determination. Contrary to Petitioner's statement, the findings of fact in Paragraph 38 of the Recommended Order were based on competent substantial evidence. See Transcript, Volume I, Pages 33-37, 62-68, 82-85, and 90-91. Therefore, Petitioner's exception to the findings of fact in Paragraph 38 of the Recommended Order is denied.

Petitioner excepted to the finding of fact in Paragraph 43 of the Recommended Order stating the Respondent incorrectly adjusted to the lowest payment code without a review of the medical records later. Petitioner failed to offer any citations to the record in support of this argument. See § 120.57(1)(*k*), Fla. Stat. Further, there was competent substantial evidence in the record to support the ALJ's findings. See Transcript, Volume I, Pages 36-37, 62-68, and 70-73. Therefore, Petitioner's exception to the findings of fact in Paragraph 43 of the Recommended Order is denied.

Petitioner excepted to the findings of fact in Paragraph 45 of the Recommended Order arguing the adjusted claims for a domiciliary or custodial care visit were not taken into account by the statistical analysis or the outside consultant, and, therefore, the extrapolation was invalid.

However, this argument is contradicted by competent substantial record evidence. See Transcript, Volume I, Pages 36-37 and 62-68. Therefore, Petitioner's exception to the findings of fact in Paragraph 45 of the Recommended Order is denied.

Petitioner excepted to the findings of fact in Paragraph 48 of the Recommended Order arguing Dr. Edgar contradicted himself by at first stating he agreed with the first peer reviewer, then later stating he disagreed with the first peer reviewer. However, Petitioner's reading of Paragraph 48 is erroneous. Petitioner overlooked the word "initially" at the beginning of the second sentence in Paragraph 48. Paragraphs 49 and 50 of the Recommended Order, explain that, on reconsideration, Dr. Edgar's opinion did differ somewhat from the first peer reviewer. Further, the ALJ weighed Dr. Edgar's testimony and found it to be credible. Thus, the Agency cannot re-weigh Dr. Edgar's testimony. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Petitioner's exception to the findings of fact in Paragraph 48 of the Recommended Order is denied.

Petitioner excepted to the findings of fact in Paragraph 51 of the Recommended Order arguing the extrapolation was not conducted pursuant to proper statistical analysis in that the standard deviation within two to three degrees was exceeded, which resulted in a predetermination to show overpayment by use of a biased sample. However, there was competent substantial evidence to support the ALJ's findings. See Respondent's Exhibit 27, Pages 19-27 and 30-34. Therefore, Petitioner's exception to the findings of fact in Paragraph 51 of the Recommended Order is denied.

Petitioner excepted to the findings of fact in Paragraph 52 of the Recommended Order stating the ALJ made an assumption based on the fact that the statistical analysis was valid, and her finding that a review of all of the records would show that Petitioner actually owed more

than the claimed overpayment was not supported by the evidence. However, the ALJ's findings were based on competent substantial evidence, namely the testimony of Respondent's expert, Mark E. Johnson, Ph.D., which the ALJ found to be credible. See Respondent's Exhibit 27, Pages 30-34. Therefore, Petitioner's exception to the findings of fact in Paragraph 52 of the Recommended Order is denied.

Petitioner excepted to the ALJ in that, according to Petitioner, the ALJ did not review, comment on, or make any ruling concerning the testimony of Petitioner's expert, Dr. Asher, thus depriving Petitioner of a fair hearing. However, Petitioner offers no legal basis for this novel exception. See § 120.57(1)(*k*), Fla. Stat. Further, Petitioner's exception is without merit. While not specifically referring to Dr. Asher by name, the ALJ, in Paragraph 71 of the Recommended Order, concluded "Petitioner presented no persuasive evidence that Respondent's statistical formula, data, or calculations are invalid." This statement inferred that the ALJ considered the testimony of Dr. Asher and found it not credible. The Agency cannot re-weigh the evidence presented at hearing. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Petitioner's exception to the ALJ is 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 owes the Agency for an overpayment in the amount of $39,055.34, less an adjustment for the September 7, 1998 claim in the amount of $53.37, for a total of $39,001.97, plus statutory interest. Petitioner shall make full payment of the monies 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.

Petitioner's Motion for Costs pursuant to Section 409.913(23), Florida Statutes, is granted. Costs shall be assessed against the Respondent in an amount that reflects the actual investigative, legal, and expert witness costs. The parties shall attempt to stipulate to the costs related to the investigation and prosecution of this case. In the event that the parties cannot so stipulate, this issue shall be remanded to the Division of Administrative Hearings.

DONE and ORDERED this 5th day of May, 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 17th day of May, 2005.

RICHARD J. SHOOP, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, MS#3
Tallahassee, Florida 32308
(850) 922-5873

COPIES FURNISHED TO:

Suzanne F. Hood
Administrative Law Judge
Division of Administrative Hearing
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Debora E. Fridie, Esquire
Assistant General Counsels
Agency for Health Care Administration
2727 Mahan Drive, MS#3
Tallahassee, Florida 32308

John D. Buchanan, Jr., Esquire
Henry, Buchanan, Hudson, Suber & Carter, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301

William H. Roberts
Acting General Counsel
Agency for Health Care Administration
2727 Mahan Drive, MS#3
Tallahassee, Florida 32308

Medicaid Program Integrity
Agency for Health Care Administration
2727 Mahan Drive, MS#4
Fort Knox Building III
Tallahassee, Florida 32308

Jean Lombardi
Finance & Accounting