STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

MEDICAL SERVICES CONSORTIUM, INC. d/b/a MEDICAL SERVICES CONSORTIUM,

Petitioner,

v.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

DOAH CASE NO. 04-4450MPI
(formerly DOAH CASE NO. 01-2177MPI)
AHCA AUDIT NO. CI 00-1071-000-3
RENDITION NO.

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), Claude B. Arrington, conducted a formal administrative hearing. The Recommended Order of February 28, 2006, 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 findings of fact in Paragraph 5 of the Recommended Order, arguing that they were incomplete and misleading. However, the findings of fact in Paragraph 5 of the Recommended Order were based on competent substantial evidence. See Transcript, Volume VI, Pages 716-717. Thus, the Agency cannot reject or modify them. 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 No. 1 is denied.

In Exception No. 2, Petitioner took exception to the findings of fact in Paragraph 6 of the Recommended Order, arguing they were incomplete, and, therefore, misrepresented the facts, leading to unsupported conclusions. However, the findings of fact in Paragraph 6 of the Recommended Order were based on competent substantial evidence, as cited by the ALJ. See Transcript, Volume VI, Page 716. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. What the findings may or may not imply is not a valid basis for rejecting or modifying findings of fact. Therefore, Petitioner's Exception No. 2 is denied.

In Exception No. 3, Petitioner took exception to the findings of fact in Paragraph 13 of the Recommended Order, arguing they were incorrect and unsupported by the record. However, the findings of fact in Paragraph 13 of the Recommended Order were based on competent substantial evidence. See Transcript, Volume V, Pages 577-579. In making these findings, the ALJ weighed the testimony and evidence presented at hearing. Petitioner is, in essence, asking the Agency to re-weigh the testimony and evidence in order to reach findings that are more favorable to its position, which the Agency cannot do. 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 findings of fact in Paragraph 14 of the Recommended Order, arguing that they were unsupported by the record. However, contrary to Petitioner's argument, the findings of fact in Paragraph 14 of the Recommended Order were

based on competent substantial evidence. See Transcript, Volume II, Pages 91-93, 110-112, 177-179, 180-181, and 242-245; Transcript, Volume III, Pages 261-267 and 281; and Respondent's Exhibit #6. Thus, the Agency cannot reject them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Petitioner's Exception No. 4 is denied.

In Exception No. 5, Petitioner took exception to the findings of fact in Paragraph 22 of the Recommended Order, arguing that they were unsupported by the record. However, contrary to Petitioner's argument, the findings of fact in Paragraph 22 of the Recommended Order were based on competent substantial evidence. See Transcript, Volume III, Pages 321-322 and 335-336; Transcript, Volume IV, Pages 451-452; and Respondent's Exhibit #27. Thus, the Agency cannot reject them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Petitioner's Exception No. 5 is denied.

In Exception No. 6, Petitioner took exception to the finding of fact in Paragraph 23 of the Recommended Order, arguing that it was erroneous. However, the Agency can only reject or modify the finding of fact in Paragraph 23 of the Recommended Order if it was not based on competent substantial evidence. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. The finding of fact in Paragraph 23 of the Recommended Order was a reasonable inference based on competent substantial evidence. See Transcript, Volume II, Pages 184-185; Transcript, Volume III, Pages 300 and 307; Transcript, Volume IV, Page 474; and Respondent's Exhibits #25 and #27. Therefore, Petitioner's Exception No. 6 is denied.

In Exception No. 7, Petitioner took exception to the findings of fact in Paragraph 25, arguing the findings of fact are clearly erroneous and reflect a reading of the prescription requirements that were not in place at the time of the audit at issue in this case. According to Petitioner, the information kept by the Petitioner in its computer system complied with the

Medicaid recordkeeping requirements, and the Agency was misinterpreting a Board of Pharmacy rule by arguing to the contrary. Furthermore, Petitioner argued that keeping the records in its computer system was in compliance with Uniform Electronic Transactions Act, which, according to Petitioner, the Board of Pharmacy has not enacted any regulations to opt out of. First, the Agency can only reject or modify findings of fact if, after a review of the entire record, the Agency finds that there is no competent substantial evidence to support the findings. After reviewing the record in this matter, the Agency finds that the findings of fact in Paragraph 25 of the Recommended Order were based on competent substantial evidence. See Transcript, Volume III, Pages 298-299, 320-322, 325-326, 333; Transcript, Volume IV, Pages 385-387, 471-473, 519-521; and Respondent's Exhibits #29, #30 and #35. Second, Petitioner's arguments concerning the Uniform Electronic Transactions Act are without merit. 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 June 24, 1998, to June 1, 2000. So, the Uniform Electronic Transactions Act would not be applicable to any audited prescriptions at issue in this proceeding. Additionally, 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 at issue in this case, 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, Petitioner's Exception No. 7 is denied.

In Exception No. 8, Petitioner took exception to the findings of fact in Paragraph 27 of the Recommended Order, arguing that they were erroneous and not supported by the record. However, contrary to Petitioner's argument, there was competent substantial evidence to support the ALJ's findings in Paragraph 27 of the Recommended Order "that the computer records maintained by the Petitioner did not retain prescriptions in the format dictated by rule." See, e.g., Transcript, Volume III, Pages 298-299, 320-322, 325-326 and 333; and Respondent's Exhibit #35. Thus, the Agency cannot reject them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Petitioner's Exception No. 8 is denied.

In Exception No. 9, the Petitioner took exception to the findings of fact in Paragraph 28 of the Recommended Order, arguing that they were erroneous and unsupported by the record. However, contrary to Petitioner's argument, the findings of fact in Paragraph 28 of the Recommended Order were based on competent substantial evidence. See, e.g., Transcript, Volume III, Pages 298-299, 320-322, 325-326 and 333; and Respondent's Exhibit #35. Thus, the Agency cannot reject them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Petitioner's Exception No. 9 is denied.

In Exception No. 10, Petitioner took exception to the findings of fact in Paragraph 29 of the Recommended Order, arguing that they were erroneous and unsupported by the record. Petitioner based this argument on the reasoning set forth in its Exception Nos. 6 and 7. Based on the rulings on Petitioner's Exception Nos. 6 and 7 supra, Petitioner's Exception No. 10 is also denied.

In Exception No. 11, Petitioner took exception to the findings of fact in Paragraph 32 of the Recommended Order, arguing that the findings were erroneous and not supported by the record. In making the Finding of Fact in Paragraph 32 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 Paragraph 32 of the Recommended Order, the Petitioner is again, in essence, asking the Agency to re-weigh this record evidence in order to making findings more favorable to its position, which the Agency cannot do. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Petitioner's Exception No. 11 is denied.

In Exception No. 12, Petitioner took exception to the conclusions of law in Paragraph 42 of the Recommended Order as being without merit. Petitioner's argument was based on the arguments in its Exception No. 7. Based on the ruling on Exception No. 7 supra., Petitioner's Exception No. 12 is denied.

In Exception No. 13, Petitioner took exception to the conclusions of law in Paragraph 43 of the Recommended Order, arguing they were erroneous and without merit. 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 43 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. 13 is denied.

Petitioner's Exception Nos. 14 and 15, which take exception to the conclusions of law in Paragraphs 44 and 45 of the Recommended Order, are based on its Exception Nos. 1-13, which have all been denied. Therefore, based upon the rulings on Petitioner's Exception Nos. 1-13 supra, Petitioner's Exception Nos. 14 and 15 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 $1,053,137.49 in Medicaid overpayments to the Agency. Petitioner shall make full payment of the monies, totaling $1,053,137.49, 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 15 day of May, 2006, in Tallahassee, Florida.

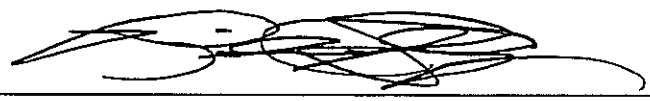
ALAN LEVINE, Secretary
AGENCY FOR HEALTH CARE ADMINISTRATION

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, 2006.



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