STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

ORTHOPAEDIC MEDICAL GROUP OF TAMPA BAY/STUART A. GOLDSMITH, P.A.,

Petitioner,

vs.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

DOAH CASE NO. 04-4625MPI
AHCA AUDIT NO. CI 01-0590-000
AHCA RENDITION NO.

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 December 30, 2005, is attached to this Final Order and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

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

In Exception No. 1, the Agency took exception to Paragraph 5 of the Recommended Order, arguing the ALJ's finding of fact was contrary to and unsupported by the evidence as the parties stipulated to the records in the Dr. Averbuch deposition and at trial. In support of this argument, the Agency cites to the Transcript, Pages 9-11 and 14-15. However, the stipulations discussed on those pages were to the admissibility of the records in the Agency's possession, not whether those records were complete. There was no stipulation by the parties contained within the record of this case as to the completeness of the records in the Agency's possession.

Nevertheless, contrary to the ALJ's finding, which is actually a conclusion of law, it was not the burden of the Agency to establish that the records provided to Dr. Averbuch were complete. Under Section 409.913(21), Florida Statutes (2000), the audit report, supported by agency work papers, showing an overpayment to a provider constitutes evidence of the overpayment. In this case, the audit report and agency work papers were part of the record evidence. See Joint Exhibits 1-30; and Respondent's Exhibits 31, 33, 36, 37, 38, 39, 40, 41, and 42. It was the burden of Petitioner to rebut this evidence, and for the reasons set forth below in the rulings on Exceptions 4-13 infra, the Petitioner failed to do that. Furthermore, under Section 409.913(7)(f) & (8), Florida Statutes (2000), Medicaid providers are required to retain all records for five years, and furnish these records to the Agency upon request. The Petitioner failed to comply with these provisions since there were records referenced at hearing that were not given to the Agency. Thus, the Agency finds that it has substantive jurisdiction over the conclusion of law in Paragraph 5 of the Recommended Order and that it could substitute a conclusion of law as or more reasonable than that of the ALJ. Therefore, Exception No. 1 is granted and the first sentence of Paragraph 5 of the Recommended Order is stricken in its entirety.

In Exception No. 2, the Agency took exception to the portion of Paragraph 9 of the Recommended Order, wherein the ALJ found "[r]espondent did not establish what records he reviewed, where they came from, or that they were complete." For the reasons set forth in the ruling on Exception No. 1, Exception No. 2 is granted and the second sentence of Paragraph 9 of the Recommended Order is stricken in its entirety.

In Exception No. 3, the Agency took exception to the portion of Paragraph 9 of the Recommended Order wherein the ALJ found that "[r]espondent did not establish what criteria Dr. Averbuch relied upon in arriving at his opinion", arguing the finding was contrary to and

unsupported by the evidence. The Agency is correct in its argument because there was competent substantial evidence to indicate what criteria Dr. Averbuch relied upon in arriving at his opinion. See, e.g., Deposition of Dr. Averbuch at Pages 6, 19 and 28. Therefore, Exception No. 3 is granted and the last sentence of Paragraph 9 of the Recommended Order is stricken in its entirety.

In Exception Nos. 4, 5 and 6, the Agency took exception to Paragraphs 17, 20, 21, 22 and 23 of the Recommended Order, wherein the ALJ found that there was no record evidence to support the value of certain codes in the record, yet then proceeded to assign dollar values to these codes; as well as all the paragraphs of the Recommended Order that made findings and conclusions using these values. The Agency established the dollar value of these codes in its Audit Report and supporting documentation, which were a part of the record of this case. See Joint Exhibits 1-30; and Respondent's Exhibit 42. The Petitioner failed to rebut these values as admitted by the ALJ. Thus, the values assigned to these codes were not based on competent substantial evidence, and can be rejected by the Agency. 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, the Agency's Exception Nos. 4, 5 and 6 are granted and Paragraphs 17, 20, 21, 22 and 23 of the Recommended Order are stricken in their entirety, along with the portions of Paragraphs 25, 27, 29, 33, 35, 37, 39, 42, 45, 47, 50, 53, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 79, 82, 84, 85, and 105 of the Recommended Order, wherein

the ALJ made findings using the dollar values he assigned to these codes. However, based upon the ruling on the Agency's Exceptions 7-13 infra, Exceptions 4, 5 and 6 are now moot.

In Exception Nos. 7-13, the Agency took exception to the ALJ's findings and conclusions that were based on the testimony of Petitioner's expert, Jeffrey Howard. Jeffrey Howard was qualified by the ALJ as an expert in the area of CPT coding. See Transcript, Page 91. As an expert in the area of CPT coding, Mr. Howard was competent to testify as to the meaning of the first four digits of a CPT code, and even the significance of the last digit of a CPT code. See Transcript, Pages 83-84. However, Mr. Howard was not competent to testify about how a doctor arrived at deciding what the last digit of a CPT code should be, which required medical judgment on the part of a doctor. See Transcript, Pages 187 ("I'm not medically train[ed]."), 192 ("I'm not qualified to answer medical questions."), 193, 195, 196, 199, 200, 214, 220, 222 ("I can't speak from a medical standpoint."), 226-227, 228, and 229-230. Yet Mr. Howard went beyond the scope of his expertise and gave medical opinions throughout his testimony. See Transcript, Pages 99, 100-101, 105-108, 109-110, 112-113, 115, 116-117, 118-119, 120, 122-123, 126, 127-137, 138-139, 141, 142-143, 144-145, 147-148, 149-152, 154, 155-156, 157, 158-159, 161-163, 164-166, 168-169, 170-171, and 172-173. Because Mr. Howard was not qualified to give medical opinions, the medical opinions he gave during his testimony were not competent substantial evidence upon which the ALJ could base a finding of fact. See, e.g., Chudnof-James v. Racetrac Petroleum, Inc., 827 So.2d 369, 370 (Fla. 1st DCA 2002); and Norrell Corporation v. Carle, 509 So.2d 1377, 1378 (Fla. 1st DCA 1987). Therefore, Exception Nos. 7-13 are granted and Paragraphs 25, 27, 29, 33, 35, 37, 39, 42, 45, 47, 50, 53, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 79, 82, 84, 85, and 105 of the Recommended Order are stricken in their entirety.

FINDINGS OF FACT

The Agency adopts the findings of fact set forth in the Recommended Order, except where noted supra.

CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Recommended Order, except where noted supra.

IT IS THEREFORE ORDED AND ADJUDGED THAT:

Petitioner is required to repay $81,682.06 in Medicaid overpayments to the Agency for paid claims covering the period from January 1, 2001, through January 1, 2003. Petitioner shall make full payment of the monies, totaling $81,682.06, 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 3rd day of March, 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 7th day of March, 2006.

RICHARD J. SHOOP, Agency Clerk
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COPIES FURNISHED TO:

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