STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

2006 MAY 31 P 12:22

DISNEY MEDICAL EQUIPMENT, INC. d/b/a DISNEY PHARMACY DISCOUNT,

Petitioner,

vs.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

DOAH CASE NO. 05-2277MPI
AUDIT NO. C.I. 02-0508-000
RENDITION NO.

FILED
2006 JUN -1 P 1:06
DIVISION OF ADMINISTRATIVE HEARINGS

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), John G. Van Laningham, conducted a formal administrative hearing. At issue in this proceeding is whether the Petitioner must reimburse the Respondent an amount up to $1,676,390.45 for payments received from the Respondent for the dispensing of pharmaceuticals between July 3, 2000 and March 28, 2002. The Recommended Order dated April 11, 2006, is incorporated herein by reference.

RULING ON EXCEPTIONS

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

Petitioner took exception to the findings of fact in Paragraphs 4, 5, 6, 7, 8 and 9 of the Recommended Order, arguing that they were based solely on hearsay and not supported by any competent substantial evidence. Petitioner is, in essence, asking the Agency to rule on evidentiary issues that are outside the scope of the Agency's authority. See Barfield v.

Department of Health, 805 So.2d 1008 (Fla. 1st DCA 2001). Furthermore, the findings of fact in Paragraph 4, 5, 6, 7, 8 and 9 of the Recommended Order were based on competent substantial record evidence. See Transcript, Pages 32-38, 41 and 43-44; and Respondent's Exhibits 1, 2, 5 and 6. 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 exceptions to Paragraphs 4, 5, 6, 7, 8 and 9 of the Recommended Order are denied.

Petitioner took exception to the findings of fact in Paragraph 12 of the Recommended Order, arguing that the handbook relied upon by the ALJ was not introduced into the record, nor was there any evidence in the record to show which handbook may have been in effect during the audit period. However, the ALJ took official recognition of the Medicaid Handbook, which was incorporated by Agency rule, and neither party objected to it. See Endnote 2 of the Recommended Order. The findings of fact in Paragraph 12 of the Recommended Order were based upon the Medicaid Handbook, which was made a part of the record. Thus, the Agency cannot reject or modify the ALJ's findings. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Petitioner's exception to the findings of fact in Paragraph 12 of the Recommended Order is denied.

Petitioner took exception to the findings of fact in Paragraph 14 of the Recommended Order, arguing that they were not based on any competent substantial evidence. Paragraph 14 of

the Recommended Order contains summary findings of fact based upon reasonable inferences made by the ALJ from competent substantial evidence. See Transcript, Pages 64-65, 71-72 and 85-86. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Petitioner's exception to Paragraph 14 of the Recommended Order is denied.

Petitioner took exception to the findings of fact in Paragraph 15 of the Recommended Order, arguing that they were not based on competent substantial evidence. However, contrary to Petitioner's argument, the findings of fact in Paragraph 15 of the Recommended Order were summary findings based upon reasonable inferences made by the ALJ from competent substantial evidence. See, e.g., Transcript, Pages 32-38 and 85-86. The Petitioner is again, in essence, asking the Agency to re-weigh the evidence in order to make 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 to the findings of fact in Paragraph 15 of the Recommended Order is denied.

Petitioner took exception to the conclusions of law in Paragraphs 24, 25, 29 and 32 of the Recommended Order, arguing that the ALJ was relying on an erroneous interpretation of Section 409.913(22), Florida Statutes. Petitioner also argued Section 409.913(22), Florida Statutes, is unconstitutional. Petitioner's exceptions are based on its exceptions to the findings of fact in Paragraphs 4, 5, 6, 7, 8 and 9 of the Recommended Order, which were denied. Further, the Agency does not have jurisdiction to rule on the facial constitutionality of a statute. See Smith v. Willis, 415 So.2d 1331 (Fla. 1st DCA 1982) ("While a Florida agency may construe a statute or apply it mindful of constitutional influences, questions of facial statutory validity must either be carried unparsed through the administrative process to a District Court of Appeal, for decision

there if necessary, or they must be decided collaterally in circuit court.") Therefore, Petitioner's exceptions to Paragraphs 24, 25, 29 and 32 of the Recommended Order are denied.

Petitioner took exception to the conclusion of law in Paragraph 30 of the Recommended Order, arguing the ALJ was speculating regarding the purpose of Section 409.913(22), Florida Statutes. Petitioner further argued there was no competent substantial evidence that the audit report would have been admissible in a civil proceeding. The Petitioner is again asking the Agency to rule on evidentiary issues that are outside the scope of the Agency's authority. See Barfield. Therefore, Petitioner's exception to the conclusions of law in Paragraph 30 of the Recommended Order is denied.

Petitioner took exception to the conclusions of law in Paragraph 31 of the Recommended Order, arguing that the factual assertions contained within the conclusions of law were not based on competent substantial evidence. The conclusions of law in Paragraph 31 of the Recommended Order were based on the findings of fact in Paragraphs 4, 5, 6, 7, 8 and 9, which, in turn, were based on competent substantial evidence. See Transcript, Pages 32-38, 41 and 43-44; and Respondent's Exhibits 1, 2, 5 and 6. The Agency finds that it could not substitute conclusions of law as or more reasonable than those of the ALJ. Therefore, Petitioner's exception to Paragraph 31 of the Recommended Order is denied.

Petitioner took exception to the conclusion of law in Paragraph 33 of the Recommended Order, arguing that it sets forth irrelevant findings. However, Petitioner did not identify a legal basis for the exception or include appropriate and specific citations to the record. 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." Therefore, the Agency declines to rule on Petitioner's exception to the conclusions of law in Paragraph 33 of the Recommended Order.

Petitioner took exception to the conclusions of law in Paragraph 34 of the Recommended Order, arguing that there was no competent substantial evidence to support the ALJ's conclusion that any instructions in the Medicaid Handbook were "...clear and unambiguous...." The ALJ's conclusion was based on his interpretation of the Medicaid Handbook, of which the ALJ took official notice and incorporated as part of the record. The Agency finds that, while it does have substantive jurisdiction over the conclusion of law in Paragraph 34 of the Recommended Order, it could not substitute a conclusion of law as or more reasonable than that of the ALJ. Therefore, Petitioner's exception to Paragraph 34 of the Recommended Order is denied.

Petitioner took exception to the conclusions of law in Paragraphs 35 and 36, arguing that they were based on a lack of competent substantial evidence. The conclusions of law in Paragraphs 35 and 35 of the Recommended Order were based on the ALJ's interpretation of the pertinent laws and rules as applied to the findings of fact in the Recommended Order, which, in turn, were based on competent substantial evidence. See, e.g., Transcript, Pages 32-38, 41 and 43-44; and Respondent's Exhibits 1, 2, 5 and 6. The Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraphs 35 and 36 of the Recommended Order, it could not substitute conclusions of law as or more reasonable than those of the ALJ. Therefore, the Petitioner's exceptions to Paragraphs 35 and 36 of the Recommended Order are 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 $1,676,390.45 in Medicaid overpayments to the Agency for the dispensing of pharmaceuticals between July 3, 2000 and March 28, 2002. Petitioner shall make full payment of the monies, totaling $1,676,390.45, 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 25 day of May, 2006, in Tallahassee, Florida.

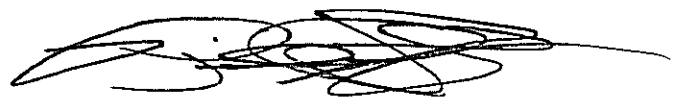
ALAN LEVINE, Secretary
AGENCY FOR HEALTH CARE ADMINISTRATION

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 31st day of May, 2006.



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