STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE ADMINISTRATION, Petitioner, vs. JESUS NEGRETTE, M.D., Respondent.	)	Case No. 06-2455MPI

RECOMMENDED ORDER

Pursuant to notice, a final hearing was scheduled in this case by video teleconference on October 23, 2006, with connecting sites in Miami and Tallahassee, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings. At the request of the parties, the hearing was cancelled. The parties stipulated and agreed, among other things, that no hearing was necessary and that a recommended order could be issued based upon the record.

APPEARANCES

For Petitioner: Jeffries H. Duvall, Esquire
Agency for Health Care Administration
Fort Knox Building III, Mail Station 3
2727 Mahan Drive
Tallahassee, Florida 32308

For Respondent: Manuel R. Lopez, Esquire
Manuel Lopez & Associates, P.A.
770 Ponce De Leon Boulevard, Penthouse
Miami, Florida 33134

STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner was overpaid by the Medicaid program as set forth in Petitioner's Final Agency Audit Report dated June 12, 2006 for the period January 1, 2002 through December 31, 2004.

PRELIMINARY STATEMENT

By a preliminary audit report dated August 25, 2005, Jesus Negrette, M.D., was notified by the Agency for Health Care Administration (AHCA) that at review of his Medicaid claims for the period January 1, 2002 through December 31, 2004, indicated that he had been overpaid by the Medicaid program in the amount of $137,051.25. By Final Audit Report (FAR) dated June 12, 2006, Dr. Negrette was notified by the AHCA that, after a review of all documentation submitted, it had determined that he had been overpaid by the Medicaid program in the amount of $79,523.70. The procedure and formula for the calculation of the overpayment was included in the FAR. Dr. Negrette, through counsel, disputed the FAR and requested a hearing. On July 13, 2006, this matter was referred to the Division of Administrative Hearings.

In his request for hearing, Dr. Negrette had set forth the affirmative defense of setoff. Prior to hearing, Dr. Negrette filed a Memorandum of Law in Support of Affirmative Defense of

Set-Off (Affirmative Defense of Set-Off). Dr. Negrette contended that, if he was overpaid, he was entitled to a set-off for services that he had rendered during the audit period for which he did not file claims but for which he was otherwise entitled to receive payment. AHCA filed a response to the Affirmative Defense of Set-Off (Response). The undersigned ruled in an Order Denying Affirmative Defense of Set-Off that a set-off was not an applicable remedy in the instant matter and that, therefore, Dr. Negrette was not entitled to a set-off.[1]

Subsequently, the parties filed a Joint Pre-hearing Stipulation in which certain facts were agreed upon. Further, the parties stipulated and agreed, among other things, that a hearing was not necessary in the case at hand; and that the undersigned could issue a recommended order on the record, including that the amount calculated by AHCA the Medicaid overpayment, $79,523.70, was a proper computation and that Dr. Negrette did not agree with the undersigned's ruling on the Affirmative Defense of Set-Off or relinquish any right to appeal the ruling. The final hearing was canceled, and a telephone conference was held regarding the parties' Joint Pre-Hearing Stipulation. During the telephone conference, the parties, among other things, confirmed their stipulation and agreement.

This Recommended Order is issued in light of the stipulation and agreement of the parties. § 120.569(1), Fla. Stat. (2006).

FINDINGS OF FACT

1. AHCA audited certain of Dr. Negrette's Medicaid claims pertaining to services rendered between January 1, 2002 and December 31, 2004, hereinafter the audit period.

2. Dr. Negrette was an authorized Medicaid provider during the audit period.

3. During the audit period, Dr. Negrette had been issued Medicaid provider number 061422000.

4. No dispute exists that, during the audit period, Dr. Negrette had a valid Medicaid Provider Agreement with AHCA.

5. For services provided during the audit period, Dr. Negrette received in excess $79,523.70 in payments for services to Medicaid recipients.

6. By a preliminary audit report dated August 25, 2005, AHCA notified Dr. Negrette that a preliminary determination was made that he was overpaid by the Medicaid program in the amount of $137,051.25.

7. Subsequently, by a FAR dated June 12, 2006, AHCA notified Dr. Negrette that, after a review of all documentation submitted, it determined that he had been overpaid by the

Medicaid program in the amount of $79,523.70, thus, reducing the amount of the overpayment.

8. The FAR further provided how the overpayment was calculated using a sample of the claims submitted during the audit period, including the statistical formula for cluster sampling; and indicated that the statistical formula was generally accepted and that the statistical formula showed an overpayment in the amount of $79,523.70, with a 95 percent probability of correctness.

9. Dr. Negrette agrees that the mathematical computation of the audit is correct.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).

11. The burden of proof is on AHCA to establish a Medicaid overpayment by a preponderance of the evidence. South Medical Services, Inc. v. AHCA, 653 So. 2d 440, 441 (Fla. 3d DCA 1995).

12. Section 409.913(10), Florida Statutes (2001-2003), and Section 409.913(11), Florida Statutes (2004), provide that "The agency may require repayment for inappropriate, medically unnecessary, or excessive goods or services from the person

furnishing them, the person under whose supervision they were furnished, or the person causing them to be furnished."

13. Overpayment is defined by Sections 409.913(1)(d), Florida Statutes (2001), and 409.913(1)(e), Florida Statutes (2002-2004), as including "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, or abuse, or mistake."

14. Section 409.913, Florida Statutes (2001-2003), provides in pertinent part:

> (21) The audit report, supported by agency work papers, showing an overpayment to a provider constitutes evidence of the overpayment. . . .

Section 409.913, Florida Statutes (2004), provides in pertinent part:

> (22) The audit report, supported by agency work papers, showing an overpayment to a provider constitutes evidence of the overpayment. . . .

Pursuant to the said subsections, AHCA can establish a prima facie case of overpayment merely by the admission into evidence of a properly supported audit report. See Maz Pharmaceuticals, Inc. v. Agency for Health Care Administration, DOAH Case No. 97-3791 (Recommended Order, March 20, 1998).

15. No dispute exists that AHCA has established a prima facie case of overpayment.

16. Moreover, no dispute exits that AHCA has established a case of overpayment and that the amount of $79,523.70 is a proper computation of the overpayment.

17. AHCA demonstrated that Dr. Negrette received Medicaid overpayments in the amount of $79,523.70 for the audit period January 1, 2002 through December 31, 2004.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Agency for Health Care Administration enter a final order finding that Jesus Negrette, M.D., received overpayments from the Medicaid program in the amount of $79,523.70, during the audit period January 1, 2002 through December 31, 2004, and requiring Jesus Negrette, M.D., to repay the amount of overpayment.

DONE AND ENTERED this 5th day of February, 2007, in Tallahassee, Leon County, Florida.

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of February, 2007.

ENDNOTE

[1/] The text, including endnotes, of the Order Denying Affirmative Defense of Set-Off is set forth below:

Order Denying Affirmative Defense of Set-Off

This cause came before the undersigned on Respondent's Memorandum of Law in Support of Affirmative Defense of Set-Off (Affirmative Defense of Set-Off). Respondent seeks a preliminary ruling as to whether he is entitled to an affirmative defense of set-off for vaccinations that he administered during the audit period and for which he did not receive payment due to the Medicaid program's one year statute of limitation on billing. Petitioner filed a Response to Petitioner's [sic] Affirmative Defense of Set-Off (Response).

In his Affirmative Defense of Set-Off, Respondent avers, among other things, in his Statement of Facts that Petitioner's documentation reviewing doctor informed Respondent that he had not billed certain items related to vaccinations and advised Respondent to bill the items, retroactively; that Respondent billed the items as advised, but that Medicaid regulations did not permit billing beyond one year, retroactively, from the date of service and that, therefore, Respondent could not be paid for the certain items related to vaccinations beyond one year from the date of service; and that, however, Respondent is entitled to a set-off in that any overpayment should be reduced by the aforementioned vaccinations administered by Respondent. Respondent included a Memorandum of Law in support of his position.

Petitioner avers, among other things, as to facts, that no disagreement exists that Medicaid's policy requires claims for payment of Medicaid services be made within 12 months of the date service is rendered, but that Respondent may not avail himself of a set-off for any overpayment by Medicaid. Petitioner also included case law and argument in support of its position.

According to Petitioner's Final Audit Report (FAR) dated June 12, 2006, Petitioner performed an audit of Respondent's Medicaid claims for the period covering January 1, 2002 through December 31, 2004. Petitioner indicated in its FAR, among other things, that a preliminary audit report, dated August 25, 2005, provided that Respondent had been overpaid in the amount of $137,051.25, but that, upon review of all documentation submitted, Petitioner determined that Respondent had been overpaid by the Medicaid program in the amount of $79,523.70 and that a fine of $1,500 should be imposed; and, therefore, Petitioner requested in its FAR that Respondent remit $81,023.70 to it.

The Medicaid program originates in federal law; Title XIX of the Social Security Act creates the Medicaid program. The federal law provides for the operation of Medicaid programs by the states, within requirements set forth in the federal law. The federal regulations implementing the federal law require, as to timely processing of claims, that "[t]he Medicaid agency must require providers to submit all claims no later than 12 months from the date of service." 42 CFR § 447.45(d)(1). The federal regulation does not provide for a waiver of this requirement for the filing of claims. Id. A claim is defined in the federal regulations as "(1) a bill for services, (2) a line item of service, or (3) all services for one recipient within a bill." 42 CFR § 447.45(a)(2)(b).

Section 409.913(7)(e), Florida Statutes (2005), requires all Medicaid providers to submit claims "in accord with applicable provisions of all Medicaid rules, regulations, handbooks, and policies and in accordance with federal, state, and local law." In the instant matter, Petitioner is asserting that Respondent was overpaid by the Medicaid program during a specific period of time for which Petitioner performed an audit to make its determination. Overpayment is defined in Section 409.913(1)(e), Florida Statutes (2005), as including "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."[1]

For the instant matter, the requirement that a Medicaid provider file a claim for services rendered within 12 months of the date the service is rendered, without a waiver provision for such filing, is considered a statute of limitations.

The parties are in agreement that the law in Florida is well-settled that, even though a claim for damages may be time-barred by a statute of limitations as an independent claim, the claim may be asserted or revived in a defensive posture against an affirmative action and in a defensive posture as a set-off. Allie v. Ionata, 503 So. 2d 1237 (Fla. 1987); Hilsenroth v. Kessler, 446 So. 2d 147 (Fla. 3rd DCA 1984); Elbadramany v. Bryson Crane Rental Services, Inc., 630 So. 2d 214 (Fla. 5th DCA 1993); Monroe County v. McCormick, 752 So. 2d 1239 (Fla. 3rd DCA 2000).[2]

However, Petitioner argues that the legal principle is not without limitation. Petitioner argues that, when the right and the remedy are created by the same law, if the claim is not brought within the time-

period provided by the law, the claimant lacks a remedy for collection and the claim is null and void. Petitioner cites Rybovich Boat Works, Inc. v. Atkins, 585 So. 2d 270 (Fla. 1991) and Beach v. Great Western Bank, 670 So. 2d 986 (Fla. 4th DCA 1996) in support of its position.

The undersigned is not persuaded that a set-off is an applicable remedy in the instant matter.[3] The case at hand involves a regulatory action, not a civil action, in which Petitioner is seeking to recover an alleged overpayment from Respondent, a Medicaid provider. Respondent had a specific time period in which to file claims, which time period is dictated by the federal regulations and for which a waiver provision is not provided in the regulations. Respondent failed to file claims for the items, for which he allegedly could have billed, within the specific time period. Without a waiver provision, the undersigned is not persuaded that Respondent is entitled to revive time-barred claims and, therefore, entitled to a set-off.

Based on the foregoing, it is

ORDERED that Respondent is not entitled to an affirmative defense of set-off for vaccinations that he administered during the audit period and for which he did not file a claim within the Medicaid program's one-year statute of limitations on filing claims.

* * *

ENDNOTES

[1/] The definition of overpayment remained the same in the years of 2001, 2002, 2003, and 2004, which is the time period of the audit. §§ 409.913(1)(d), Fla. Stat.(2001) and 409.913(1)(e), Fla. Stat.(2002, 2003, and 2004).

[2/] Allie, supra, is the leading case.

[3/] Had this Administrative Law Judge determined that a set-off was an applicable remedy in the instant matter, Beach v. Great Western Bank, 670 So. 2d 986 (Fla. 4th DCA 1996) is persuasive. In Beach, supra, the issue involved an affirmative defense of rescission and Truth in Lending Act (TILA) damages raised by a consumer to a mortgage foreclosure action. The federal statute creating TILA included a consumer remedy of rescission and for money damages for TILA violations. The federal statute provided a three year statute of limitations for rescission and a one year statute of limitations for money damages. Additionally, the federal statute "specifically" provided that "as a defense of recoupment or set-off to an action for collection of the debt, a consumer may assert violations of TILA and the damages to which the consumer would be entitled under the statute." (citation omitted) Beach at 989. The Fourth District Court of Appeal held that, once the three-year statute of limitations expires for rescission, the expired right of rescission "may not be revived as a defense in recoupment," found that no "public policy reason for extending recoupment," and held that, therefore, "under Florida law, a consumer is not entitled to rescind the mortgage transaction and is limited to a damage set-off as provided in TILA." Beach at 988 and 993. The damage set-off relates to the specific federal statutory provision for a recoupment or set-off.

Further, the Court in Beach, supra, cited with approval Bowery v. Babbit, 99 Fla. 1151, 1163, 128 So. 801, 806 (Fla. 1930) that "when the right and remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right." Consequently, in the case at hand, since the right and the remedy are created

by the same statute, when the one-year limitation period expired, Respondent's right to file a claim for the services provided extinguished and the right could not be revived.

COPIES FURNISHED:

Jeffries H. Duvall, Esquire
Agency for Health Care Administration
Fort Knox Building III, Mail Station 3
2727 Mahan Drive
Tallahassee, Florida 32308

Manuel R. Lopez, Esquire
Manuel Lopez & Associates, P.A.
770 Ponce De Leon Boulevard, Penthouse
Miami, Florida 33134

Dr. Andrew C. Agwunobi, Secretary
Agency for Health Care Administration
Fort Knox Building, Suite 3116
2727 Mahan Drive
Tallahassee, Florida 32308

Craig Smith, General Counsel
Agency for Health Care Administration
Fort Knox Building, Suite 3431
2727 Mahan Drive, Mail Station 3
Tallahassee, Florida 32308

Richard Shoop, Agency Clerk
Agency for Health Care Administration
Fort Knox Building, Suite 3431
2727 Mahan Drive, Mail Station 3
Tallahassee, Florida 32308

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.