STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

vs. Case No. 06-4148MPI

RODOLFO DUMENIGO, M.D.,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on January 19, 2007, in Tallahassee, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Willis F. Melvin, Jr., Esquire
Agency for Health Care Administration
2727 Mahan Drive, Building 3
Tallahassee, Florida 32308

For Respondent: No Appearance

STATEMENT OF THE ISSUE

Whether the Petitioner, Agency for Health Care Administration (Petitioner or Agency), is entitled to a Medicaid reimbursement and, if so, in what amount.

PRELIMINARY STATEMENT

The Agency administers the Florida Medicaid program. On or about September 28, 2006, the Agency issued a Final Audit Report that identified the Respondent, Rodolfo Dumenigo, M.D., P.A. (Respondent), as a provider of Medicaid services. Based upon the results of an audit of the Respondent's records, the Petitioner alleged that the Respondent was overpaid $32,935.96. With the addition of an administrative fine, the Agency seeks a total of $33,935.96 from the Respondent.

The Respondent disputed the accuracy of the Final Audit Report and through his attorney, Craig A. Brand, requested a formal administrative hearing in this matter. The case was forwarded to the Division of Administrative Hearings for formal proceedings on October 25, 2006. Thereafter, the case was scheduled and conducted within ninety days following the assignment of an administrative law judge. See § 409.913(31), Fla. Stat. (2006). Notice of the hearing date and time was furnished to the Respondent through his attorney of record.

At the hearing, the Agency presented testimony from Jennifer Ellingsen, Gregory Riley, and Robi Olmstead. The Petitioner's Exhibit 1 was admitted into evidence. The Respondent did not appear and no evidence was offered on his behalf.

The transcript of the proceeding was filed with the Division of Administrative Hearings on January 29, 2007. The parties were entitled to ten days from that date within which to file a proposed recommended order. The Petitioner timely filed a Proposed Recommended Order that has been considered in the drafting of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is the state agency charged with the authority and responsibility of administering the Florida Medicaid Program. As part of this authority, the Petitioner is required to recover Medicaid overpayments when appropriate. See § 409.913, Fla. Stat. (2006).

2. At all times material to the allegations of this case, the Respondent was a licensed physician and a Medicaid provider subject to the provisions of Chapter 409.

3. As a Medicaid provider, the Respondent was authorized to provide services to eligible patients but was obligated to comply with the Medicaid Provider Agreement in doing so.

4. The Medicaid Program contemplates that authorized providers will provide services to eligible patients, bill the program and be paid according to the Medicaid standards. All Medicaid providers must practice within the guidelines of the Physicians Coverage and Limitations Handbook and applicable law.

Providers may be audited so that it can be verified the process was appropriately followed.

5. In this case, the Respondent was audited. According to the audit findings, the Respondent received payment for services that he did not perform. Dr. Eiber (a physician not part of the Respondent's practice group) reviewed and signed off on x-ray studies and reports for which the Respondent billed and was paid by Medicaid.

6. Dr. Eiber is a Medicaid provider but he is not affiliated with the Respondent or the Respondent's group.

7. In order for the Respondent to bill and receive payment for Dr. Eiber's work, the latter physician would have to be listed and identified within the group in which the Respondent practiced.

8. The Respondent was responsible for all billings for which he received payments. In connection with billing, the Respondent was required to maintain and retain all Medicaid-related invoices or claims for the audit period. In this regard, the Physician Coverage and Limitations Handbook specifies that when a radiological study is performed in an office setting, either the physician billing the maximum fee must have performed or indirectly supervised the performance and interpreted the study; or if a group practice, a member of the

group must perform all components of the services. That procedure was not followed.

9. When the Agency disallows a paid Medicaid claim, it must seek to recover the overpayment from the Medicaid provider who received payment on the claim. This is the basis of the "pay and chase" methodology used in the Medicaid program. The claims are paid, subject to audit, and recovery is sought when the claim is disallowed.

10. Based on the audit findings in this cause, the Agency seeks $32,935.96 as an overpayment of Medicaid claims paid to the Respondent. The Petitioner also seeks an administrative fine in the amount of $1000.00. The Respondent was given the results of the audit and afforded an opportunity to respond and provide additional information to the Agency to show that the amounts billed were correct. The Respondent has presented no supplemental information to corroborate the correctness of the claims at issue.

CONCLUSIONS OF LAW

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

12. As the party seeking reimbursement of the alleged Medicaid overpayment, the Petitioner bears the burden of proof

in this cause to establish the overpayment. This burden must be met by a preponderance of the evidence. See Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981), and Balino v. Department of Health & Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

13. A "preponderance" of the evidence means the greater weight of the evidence. See Fireman's Fund Indemnity Co. v. Perry, 5 So. 2d 862 (Fla. 1942). "Competent" evidence must be relevant, material and otherwise fit for the purpose for which it is offered. See Gainesville Bonded Warehouse v. Carter, 123 So. 2d 336 (Fla. 1960), and Duval Utility Co. v. FPSC, 380 So. 2d 1028 (Fla. 1980). By a preponderance of the competent evidence the Agency has met its burden in this cause.

14. Section 409.913, Florida Statutes (2006), provides, in pertinent part:

> The agency shall operate a program to oversee the activities of Florida Medicaid recipients, and providers and their representatives, to ensure that fraudulent and abusive behavior and neglect of recipients occur to the minimum extent possible, and to recover overpayments and impose sanctions as appropriate. ...
> (1) For the purposes of this section, the term:
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> * * *
>
> (e) "Overpayment" includes 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.

* * *

(7) When presenting a claim for payment under the Medicaid program, a provider has an affirmative duty to supervise the provision of, and be responsible for, goods and services claimed to have been provided, to supervise and be responsible for preparation and submission of the claim, and to present a claim that is true and accurate and that is for goods and services that:
(a) Have actually been furnished to the recipient by the provider prior to submitting the claim.

* * *

(e) Are provided in accord with applicable provisions of all Medicaid rules, regulations, handbooks, and policies and in accordance with federal, state, and local law.
(f) Are documented by records made at the time the goods or services were provided, demonstrating the medical necessity for the goods or services rendered. Medicaid goods or services are excessive or not medically necessary unless both the medical basis and the specific need for them are fully and properly documented in the recipient's medical record.

The agency may deny payment or require repayment for goods or services that are not presented as required in this subsection.

* * *

(9) A Medicaid provider shall retain medical, professional, financial, and business records pertaining to services and goods furnished to a Medicaid recipient and billed to Medicaid for a period of 5 years after the date of furnishing such services

or goods. The agency may investigate, review, or analyze such records, which must be made available during normal business hours.

* * *

(21) When making a determination that an overpayment has occurred, the agency shall prepare and issue an audit report to the provider showing the calculation of overpayments.
(22) The audit report, supported by agency work papers, showing an overpayment to a provider constitutes evidence of the overpayment.

15. In this case, the Final Audit Report and worksheets support the overpayment sought by the Agency. The Respondent presented no information to rebut the audit results. As the amount of the claims, $32,935.96, resulted from inappropriately billed for X-ray services not allowed by the guidelines, the Respondent cannot retain the Medicaid payments based upon those claims. If Dr. Eiger had been a member of the Respondent's group, the payment may have been appropriate. As it stands, since all the claims were for services rendered by Dr. Eiger, the overpayment set forth in the audit is sustained. Accordingly, the Petitioner has met its burden of proof in this cause. Furthermore, an administrative fine is allowable when an overpayment is established. <u>See</u> Fla. Admin. Code Rule 59G-9.070.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the Agency for Health Care Administration enter a Final Order sustaining the Final Audit Report and finding an overpayment against the Respondent in the amount of $32,9935.96. The Final Order should also impose an administrative fine in the amount of $1,000.00.

DONE AND ENTERED this 21st day of February, 2007, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of February, 2007.

COPIES FURNISHED:

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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.