**STATE OF FLORIDA**
**AGENCY FOR HEALTH CARE ADMINISTRATION**



STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

HAL M. TOBIAS,

Respondent.
_____/

DOAH CASE NO. 10-9318MPI
AUDIT NO. C.I. 10-9700-000
RENDITION NO.: AHCA-11- 0824 -FOF-MDO

## FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), Robert E. Meale, issued a Recommended Order after conducting a formal hearing. At issue in this proceeding is whether Respondent was overpaid by Medicaid for claims paid during the period of January 1, 2007 through June 30, 2008. The Recommended Order dated May 19, 2011, is attached to this Final Order and incorporated herein by reference, except where noted infra.

## RULING ON EXCEPTIONS

Both Petitioner and Respondent filed exceptions to the Recommended Order.

In determining how to rule upon the parties' exceptions and whether to adopt the ALJ's Recommended Order in whole or in part, the Agency for Health Care Administration ("Agency" or "AHCA") must follow Section 120.57(1)(*l*), Florida Statutes, which provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted

> conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. . . .

Fla. Stat. § 120.57(1)(*l*). In accordance with these legal standards, the Agency makes the following rulings:

**Petitioner's Exceptions**

In its first exception contained within Paragraphs 1 through 5, Petitioner takes exception to the ALJ's use of the term "sNCT" in Paragraphs 17, 22, 23, 32, 39 through 43, 45, 51, 56 and 64 of the Recommended Order, arguing that the term was used incorrectly in these paragraphs and should be replaced with the term "neural scan." However, Petitioner's own witness classified the test in question as a "sNCT" in his testimony at hearing. See Transcript, Volume II, Pages 213 and 216. Thus, the Agency is prohibited from rejecting or modifying the findings of fact in accordance with Petitioner's wishes. See § 120.57(1)(*l*), Fla. Stat.; Heifetz v. Dep't of Bus. Reg., 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Therefore, the Agency must deny Petitioner's first exception. However, nothing in this ruling changes the fact that the test in question clearly does not qualify for reimbursement under the Florida Medicaid Program.

In its second exception contained in Paragraph 6, Petitioner takes exception to the findings of fact in Paragraphs 23 through 25 of the Recommended Order, arguing that the findings of fact in these paragraphs are not based on competent, substantial evidence or are not necessary for the proper resolution of this dispute. The latter argument is irrelevant because the Agency can only reject or modify findings of fact if they are not based on competent, substantial evidence. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Since the findings of fact in these paragraphs

are based on competent, substantial evidence (See Transcript, Volume II, Pages 141-142 and 210-214; Petitioner's Exhibit D, Page 354; and Respondent's Exhibit 14), the Agency must deny Petitioner's second exception.

In its third exception contained within Paragraphs 7 through 20, Petitioner takes exception to the findings of fact in Paragraphs 28 through 31, 44 and 52 of the Recommended Order, arguing that, contrary to the ALJ's findings in Paragraph 29 of the Recommended Order, the four claims at issue in these paragraphs were not rectified by the Respondent until after the start of the audit and should therefore be included in calculating the overpayment amount. The ALJ's findings of fact in Paragraphs 28 and 29 of the Recommended Order are partially erroneous because there is no competent, substantial evidence to demonstrate that Respondent refunded the amount of these claims to the Agency prior to the start of its audit. Indeed, the record evidence suggests the opposite. Respondent's wife/office manager testified that she found out about the erroneous billings for the H-reflex Tests after the audit had begun. See Transcript, Volume IV, Page 458. However, Paragraphs 30 and 31 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume IV, Pages 445-448. Thus, the Agency cannot reject or modify the findings of fact in those paragraphs. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency grants Petitioner's third exception to the extent that it modifies Paragraphs 28, 29, 44 and 52 of the Recommended Order to state:

> 28. The issue on the H-Reflex Test is not whether Respondent was initially entitled to reimbursement--it was not. The issues are 1) whether this overpayment may be extended to the larger total overpayment determined in this case and 2) whether Respondent has already reimbursed Petitioner for this overpayment of $27.49, if not considerably more. The answer to the first question is yes, and the answer to the second question is probably not. The bottom line is that Petitioner may treat the payments for the four H-Flex tests in the sample as overpayments, to be included in the

extension calculations, because Respondent's attempts to correct the billing errors did not occur prior to the start of the audit.

29. Respondent discovered that his office had wrongly billed this procedure on 28 different occasions, but he (or his wife/office manager) did not inform Petitioner of this fact prior to the audit. Among the 30 patients randomly selected for the audit, four of them had these incorrect billings for an H-Reflex Test on an upper extremity. For obvious reasons, corrections after the start of an audit may not be allowed.

44. The other two billings are for H-Reflex Tests of upper extremities--one on March 25, 2008, and one on April 2, 2008. As noted above, Respondent never performed these tests, and did not correct the misbilling prior to the audit. Thus, the $27.49 billed for each of these tests may be extended in determining the total overpayment, and Petitioner is not required to credit Respondent for additional sums due to claimed problems in voiding these billings.

52. Respondent billed an H-Reflex Test under CPT Code 95934 on February 7, 2008, for $27.49. As noted above, Respondent never performed this test, and did not correct the misbilling prior to the audit. Thus, the $27.49 may be extended in determining the total overpayment, and Petitioner is not required to credit Respondent for additional sums due to claimed problems in voiding these billings.

In its fourth exception contained within Paragraphs 21 through 24, Petitioner takes exception to the conclusions of law in Paragraph 67 of the Recommended Order, arguing that, contrary to the ALJ's conclusion, the Petitioner did prove that the Respondent failed to make available specific Medicaid records and should therefore be fined for such a violation. In order for the Agency to impose a $1,000 fine on the Respondent for a violation of Rule 59G-9.070(7)(c), F.A.C., the Agency must prove by clear and convincing evidence that such a violation occurred. See, e.g., AHCA v. Grand Pharmacy Discount, DOAH Case No. 09-3001MPI (AHCA 2010). A review of the record reveals that there was no evidence presented by Petitioner on this issue. Furthermore, the ALJ's conclusion of law regarding whether these facts

constituted a violation of law is outside of the Agency's substantive jurisdiction. See Gross v. Dep't of Health, 819 So.2d 997, 1001 (Fla. 5th DCA 2002). Therefore, the Agency must deny Petitioner's fourth exception.

In its fifth exception contained in Paragraphs 25 and 26, Petitioner takes exception to the findings of fact in Paragraph 3 of the Recommended Order and the conclusions of law in Paragraph 64 of the Recommended Order, arguing that the overpayment calculations are done by computer, not by a statistician as found by the ALJ. Indeed, there is no competent, substantial evidence to support the ALJ's findings that a statistician generated the overpayment amount. Rather, the statistician who testified on behalf of the Petitioner stated that the overpayment amount was generated by a computer program that he verified to be accurate. See Transcript, Volume III, Pages 252-259. Therefore, Petitioner's fifth exception is granted and the Agency hereby modifies Paragraphs 3 and 64, and by extension Paragraph 2, of the Recommended Order to state:

> 2. The audit in this case involved 237 claims on behalf of 30 recipients. Of these 237 claims, Petitioner determined that 59 were overpayments. After determining the total of these 59 overpayments, Petitioner used a valid computer program to extend these 59 overpayments to the total overpayment shown in the Final Audit Report.
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> 3. Petitioner's computer program based the extension on generally accepted statistical methods, as explained by Petitioner's statistician expert at the hearing to everyone's satisfaction, as evidenced by the fact that no one asked to hear more. During the statistician's testimony, the parties agreed that, if the overpayments in the Final Audit Report are altered in the Final Order, Petitioner will plug in the new determinations to its computer program for another extension, based again, of course, on generally accepted statistical methods.
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> 64. Petitioner has proved the overpayments identified in the Findings of Fact. Using generally accepted statistical methods, as required by section 409.913(20), the Agency may extend the

overpayments identified in the Findings of Fact to a total overpayment determination. Overpayments bear interest at the statutory rate set forth in section 409.913(25)(c), "from the date of determination of the overpayment by the agency."

**Respondent's Exceptions**

In Exception Number 1, Respondent takes exception to the findings of fact in Paragraph 20 of the Recommended Order, arguing that the finding was erroneous. Respondent is partially correct. A review of James Hedgecock's Testimony in Volume III of the final hearing transcript reveals that he did not produce the neurometer. Rather, it appears from the record evidence that he modified an existing neurometer. However, in regards, to the finding of fact in the second sentence of Paragraph 20 of the Recommended Order, contrary to Respondent's argument, the finding is not erroneous but instead a summary of James Hedgecock's testimony on Pages 319-327 of Volume III of the Transcript. The Agency may reject an ALJ's findings only where there is no competent, substantial evidence from which those findings can reasonably be inferred. See Heifetz; Belleau v. Dep't of Envt'l Protection, 695 So.2d 1305 (Fla. 1st DCA 1997); Strickland v. Fla. A&M Univ., 799 So.2d 276, 278 (Fla. 1st DCA 2001). Thus, the Agency cannot reject or modify the finding of fact in the second sentence of Paragraph 20 of the Recommended Order. Therefore, the Agency grants Exception Number 1 to the extent that the first sentence of Paragraph 20 of the Recommended Order is modified to state that "the witness modified a neurometer, relying on patient response to the application of increasing voltage to the point that the nerve produced a response in the form of a stimulus."

In Exception Number 2, Respondent took exception to Paragraph 22 of the Recommended Order, arguing that there was no record support for characterizing the nerve conduction studies produced by the Axon II as "sNCTs". However, contrary to Respondent's argument, the findings of fact in Paragraph 22 of the Recommended Order were based on

competent, substantial evidence. See Transcript, Volume I, Page 88; Transcript, Volume II, Pages 175, 211-217 and 233; and Respondent's Exhibit 22 at Pages 16-17 and Pages 29-41. Thus, the Agency is prohibited by law from rejecting or modifying the findings of fact in Paragraph 22 of the Recommended Order. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency must deny Exception Number 2.

In Exception Number 3, Respondent took exception to the findings of fact in Paragraphs 25 and 26 of the Recommended Order, arguing that the ALJ wrongly classified the tests Respondent conducted with the Axon II. Contrary to Respondent's arguments, the findings of fact in Paragraphs 25 and 26 of the Recommended Order are based on competent, substantial evidence. See, e.g., Transcript, Volume II, Pages 210-214. Thus, the Agency cannot reject or modify the findings of fact in Paragraphs 25 and 26 of the Recommended Order. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency denies Exception Number 3.

In Exception Numbers 4 through 11, Respondent takes exception to the findings of fact in Paragraphs 32, 39 through 43, 45 and 51 of the Recommended Order, based on its arguments in Exception Numbers 1 through 3. The findings of fact in Paragraphs 32, 39 through 43, 45 and 51 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume II, Pages 180, 188-197, 198, 200 and 210-214; Petitioner's Exhibit P at Pages 851, 1070-1071, 1096-1099, 1143-1146, 1232-1233, 1262-1264, 1351 and 1379-1380. Thus, the Agency is not at liberty to reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. As with the first three exceptions, Respondent is essentially stating that the ALJ weighed the evidence incorrectly. However, the Agency is not authorized to substitute its judgment for that of the ALJ by taking a different view of or placing greater weight on the same evidence, re-weighing the evidence, judging the credibility of witnesses, or otherwise interpreting the evidence to fit its

desired ultimate conclusion. See Prysi v. Dep't of Health, 823 So.2d 823, 825 (Fla. 1st DCA 2002); Strickland, 799 So.2d at 279; Schrimsher v. Sch. Bd. Of Palm Beach County, 694 So.2d 856, 860 (Fla. 4th DCA 1997); Heifetz, 475 So.2d at 1281; Wash & Dry Vending Co. v. Dep't of Bus. Reg., 429 So. 2d 790, 792 (Fla. 3d DCA 1983); D'Antoni v. Dept. of Envtl. Prot., 22 F.A.L.R. 2879, 2880 (DEP, May 4, 2000); Brown v. Criminal Justice Standards & Training Comm'n., 667 So.2d 977, 979 (Fla. 4th DCA 1996). Simply put, the Agency may not reject recommended findings of fact when the question turns on the weight or credibility of testimony by witnesses, when the factual issues are otherwise susceptible of ordinary methods of proof, or when the Agency may not claim special insight as to those facts, if the finding is otherwise supported by competent, substantial evidence. See McDonald v. Dep't of Banking & Fin., 346 So.2d 569, 579 (Fla. 1st DCA 1977); Gross, 819 So.2d at 1002; Schrimsher, 694 So.2d at 860; See also McGann v. Fla. Elections Comm'n, 803 So.2d 763, 764 (Fla. 1st DCA 2001) (concluding that an agency could not reject ALJ's finding of fact on ultimate issue of "willfulness" by recasting findings as a conclusion of law); Harac v. Dep't of Prof'l Reg., 484 So.2d 1333, 1337 (Fla. 3d DCA 1986) (stating that the agency was not permitted to substitute its findings for those of ALJ on issue of architect's "competency," even though the determination of design competency required specialized knowledge and experience, because it is not so unique as to defy ordinary methods of proof in formal adversarial proceedings). Therefore, the Agency must deny Exception Numbers 4 through 11.

In Exception Number 12, Respondent takes exception to the findings of fact in Paragraph 55 of the Recommended Order, arguing that the ALJ disregarded record evidence and testimony that these amounts were repaid prior to the audit period and therefore should not be deducted. The findings of fact in Paragraph 55 of the Recommended Order are based on competent,

substantial evidence. See Transcript, Volume II, Pages 205-206; and Petitioner's Exhibit P at Page 1421. Thus, the Agency is not permitted to reject or modify these findings of fact. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Furthermore, the other record evidence mentioned by the Respondent in its exception references two claims that add up to $608.83, whereas the two claims referenced in Paragraph 55 of the Recommended Order add up to $662.78. It is obvious that the ALJ weighed both parties' testimony and evidence in making the findings of fact in Paragraph 55 of the Recommended Order. Compare Affidavit of Shari Tobias with Affidavit of Robi Olmstead. The Agency is not permitted to re-weigh this evidence in order to reach findings of fact that are more favorable to Respondent's position. See the reasoning set forth in the ruling on Respondent's Exception Numbers 4 through 11 supra. Therefore, the Agency denies Exception Number 12.

In Exception Number 13, Respondent takes exception to the findings of fact in Paragraph 3 of the Recommended Order and the conclusions of law in Paragraph 64 of the Recommended Order, arguing that the Agency should not be permitted to use statistical extrapolation to calculate the overpayment amount in this matter. With the exception of the modifications made pursuant to the ruling on Petitioner's fifth exception supra, the findings of fact in Paragraph 3 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume III, Pages 243-280. Thus, the Agency cannot reject or modify the findings of fact in Paragraph 3 of the Recommended Order. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. With the exception of the modifications made pursuant to the ruling on Petitioner's fifth exception supra, the conclusions of law in Paragraph 64 of the Recommended Order are a reasonable interpretation of the applicable statute and consistent with case law on the issue of statistical extrapolation. See § 409.913(20), Fla. Stat.; Comscript, Inc. d/b/a Comscript v. AHCA, DOAH Case No. 03-

3238MPI (AHCA 2005); and Agency for Health Care Administration v. Custom Mobility, Inc., 995 So.2d 984 (Fla. 1st DCA 2008). While the Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraph 64 of the Recommended Order because it is the single state agency charged with the administration and oversight of Florida's Medicaid program, it could not substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, for the foregoing reasons, the Agency denies Exception Number 13.

In Exception Number 14, Respondent states that this Final Order should accurately reflect that the nerve conduction studies performed by Respondent utilizing the Axon II device are sensory nerve conduction studies (sNCSs) and are specifically excluded from the Non-Coverage Determination Section 160.23 by its very language. The Agency need not rule on Exception Number 14 because Respondent failed to clearly identify the disputed portion of the recommended order by page number or paragraph, identify the legal basis for the exception and include appropriate and specific citations to the record. See § 120.57(1)(k), Fla. Stat. (2010). Alternatively, using the same reasoning in the ruling on Respondent's Exception Numbers 2 and 3 supra, the Agency denies Exception Number 14.

In Exception Number 15, Respondent states that this Final Order should reflect that Patient 29 was not the subject of double billing for MRIs as the exact same amounts had been refunded to the Agency by Respondent prior to the audit period. The Agency need not rule on Exception Number 15 because Respondent failed to clearly identify the disputed portion of the recommended order by page number or paragraph, identify the legal basis for the exception and include appropriate and specific citations to the record. See § 120.57(1)(k), Fla. Stat. (2010). Alternatively, using the same reasoning in the ruling on Respondent's Exception Number 12 supra, the Agency denies Exception Number 15.

## 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 ADJUDGED THAT:**

Respondent is required to repay $105,353.06 in Medicaid overpayments, plus statutory interest at a rate of ten (10) percent per annum, to the Agency for paid claims covering the period from January 1, 2007 through June 30, 2008. Additionally, the Agency imposes a $4,000 fine on the Respondent. Respondent shall make full payment of the overpayment and fine to the Agency for Health Care Administration within 30 days of the rendition of this Final Order unless other payment arrangements have been agreed to by the parties. Respondent 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.

Additionally, pursuant to § 409.913(23)(a), Fla. Stat., costs shall be assessed against the Respondent in an amount that reflects the actual investigative, legal, and expert witness costs. The parties shall attempt to stipulate to the costs related to the investigation and prosecution of this case. In the event that the parties cannot so stipulate, this issue shall be remanded to the Division of Administrative Hearings for an evidentiary hearing on this issue.

**DONE and ORDERED** this 8 day of August, 2011, in Tallahassee, Florida.

ELIZABETH DUDEK, 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 10th day of August, 2011.

RICHARD J. SHOOP, Agency Clerk
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