STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

JUANA RODRIGUEZ d/b/a ACCESS ROAD, INC.,

Respondent.
_____/

DOAH CASE NO. 11-4242MPI
AUDIT NO. C.I. 10-1284-100
RENDITION NO.: AHCA-12- 482 -FOF-MDO

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), Elizabeth W. McArthur, issued a Recommended Order after conducting a formal hearing. At issue in this proceeding is whether Respondent was overpaid by the Florida Medicaid program in the amount of $159,741.86 for services provided between January 1, 2007 and December 31, 2008; and whether fines should be imposed against Respondent. The Recommended Order dated March 26, 2012, is attached to this Final Order and incorporated herein by reference.

RULING ON EXCEPTIONS

Respondent filed exceptions to the Recommended Order.

In determining how to rule upon Respondent's 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:

In Exception 1, Respondent takes exception to the portion of Paragraph 14 of the Recommended Order wherein the ALJ states that "[t]he audit methods used depend on the characteristics of the provider and of the claims." Respondent argues that this finding of fact incorrectly infers that the Agency uses numerous audit formulas. However, what a finding of fact may or may not infer is not germane to whether the Agency can reject or modify it. The Agency can only reject or modify a finding of fact if it is not based on competent, substantial evidence or the proceedings from which it resulted did not comply with the essential requirements of law. Respondent has offered neither argument. Furthermore, the finding of fact in question is a reasonable inference based on competent, substantial evidence. See Transcript, Volume II, Pages 150 through 151 and 176 through 178. Thus, the Agency cannot reject or modify it. 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 Exception 1.

In Exception 2, Respondent takes exception to the findings of fact in Paragraph 17 of the Recommended Order, arguing that the ALJ made an incorrect assumption in making those findings. However, as pointed out by Petitioner in its Response to Respondent's Exceptions, the

findings of fact in Paragraph 17 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume II, Pages 147 through 148. Thus, the Agency is barred from rejecting or modifying them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency denies Exception 2.

In Exception 3, Respondent takes exception to the findings of fact in Paragraph 18 of the Recommended Order, arguing that there is no competent, substantial evidence to support the finding that Respondent only served 16 recipients, and that there is no competent, substantial evidence to support the finding that the number of recipients served was atypical. Contrary to Respondent's arguments, all of the findings of fact in Paragraph 18 of the Recommended Order are supported by competent, substantial evidence. See Transcript, Volume II, Pages 147 through 148. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency denies Exception 3.

In Exception 4, Respondent takes exception to the findings of fact in Paragraph 20 of the Recommended Order, arguing that they are not supported by competent, substantial evidence. The findings of fact in Paragraph 20 of the Recommended Order are ultimate findings of fact based on the ALJ's weighing of the record evidence in the case. The Agency cannot re-weigh the record evidence in order to reject or modify these findings. See Prysi v. Dep't of Health, 823 So.2d 823, 825 (Fla. 1st DCA 2002); Strickland v. Fla. A&M Univ., 799 So.2d 276, 279 (Fla. 1st DCA 2001); Schrimsher v. Sch. Bd. Of Palm Beach County, 694 So.2d 856, 860 (Fla. 4th DCA 1997); Heifetz v. Dep't of Bus. Reg., 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); 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); 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 4.

In Exception 5, Respondent takes exception to the findings of fact in Paragraph 28 of the Recommended Order, arguing that there is no competent, substantial evidence to support the ALJ's finding that Respondent's submission of additional documentation would result in fines for non-compliance or that the notification in the Preliminary Audit Report ("PAR") had such intent. Respondent's exception is not valid because the findings of fact in Paragraph 28 of the Recommended Order are clearly based on competent, substantial evidence. See Petitioner's Exhibit E at Page 90. Thus, there are no grounds for the Agency to reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency denies Exception 5.

In Exception 6, Respondent takes exception to the findings of fact in Paragraph 30 of the Recommended Order, arguing that there is no competent, substantial evidence that there were

findings of overpayments in the Final Audit Report ("FAR"). Respondent's argument is incorrect. The findings of fact in Paragraph 30 of the Recommended Order are based on competent, substantial evidence (See Petitioner's Exhibit G at Pages 161 through 179), and thus cannot be rejected or modified by the Agency. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency must deny Exception 6.

In Exceptions 8 through 18, Respondent takes exception to the findings of fact in Paragraphs 35 through 46 of the Recommended Order. These findings of fact address specific claims for specific recipients that formed the basis of the overpayment amount Petitioner alleged Respondent owed. In an overpayment case, the Agency must prove, by a preponderance of the evidence, that it overpaid Respondent for services rendered to Medicaid recipients. See S. Med. Servs., Inc. v. Ag. for Health Care Admin., 653 So. 2d 440, 441 (Fla. 3d DCA 1995); Southpointe Pharmacy v. Dep't of HRS, 596 So. 2d 106, 109 (Fla. 1st DCA 1992). As the ALJ correctly concluded,

> "[i]n meeting its burden of proof . . ., the agency may introduce the results of [generally accepted] statistical methods as evidence of overpayment." In addition, section 409.913(22) provides that "[t]he audit report, supported by agency work papers, showing an overpayment to the provider constitutes evidence of the overpayment." Thus, AHCA can make a prima facie case by proffering a properly-supported audit report, which must be received in evidence. See Maz Pharm., Inc. v. Ag. for Health Care Admin., Case No. 97-3791 (Fla. DOAH Mar. 20, 1998; Fla. AHCA June 26, 1998); see also Full Health Care, Inc. v. Ag. for Health Care Admin., Case No. 00-4441 (Fla. DOAH June 25, 2001; Fla. AHCA Sept. 28, 2001).

See Paragraph 57 of the Recommended Order. The Agency did so in this matter by submitting exhibits and presenting the testimony of three witnesses. See, generally, Petitioner's Exhibits A through R and Transcript, Volumes I and II. It was "incumbent upon the [Respondent] to rebut, impeach, or otherwise undermine AHCA's evidence" by presenting its own evidence to the

contrary. See Ag. for Health Care Admin. v. Bagloo, Case No. 08-4921, Recommended Order at Page 33 (Fla. DOAH Sept. 10, 2009; Fla. AHCA Nov. 8, 2010). A review of the entire record shows that, while Respondent questioned the Agency's witnesses about statistical sampling, the audit process, and the rules and regulations governing the Medicaid program (See Transcript, Volume I, Pages 30 through 50 and 112 through 133; and Transcript, Volume II, Pages 174 through 200), it made no attempt whatsoever to rebut the Agency's allegations concerning the individual claims that are discussed in the findings of fact in Paragraphs 35 through 46 of the Recommended Order. Thus, Respondent's arguments in these exceptions are unpreserved. Furthermore, Respondent's arguments in Exceptions 8 through 18 of the Recommended Order are nothing more than a thinly-veiled attempt to re-argue the case in front of the Agency in the hope of achieving a different outcome than what the ALJ proposed in the Recommended Order. However, the Agency cannot, and will not, re-weigh the evidence in order to reach findings and conclusions that differ from those of the ALJ. See the ruling on Exception 4 supra. Therefore, the Agency denies Exceptions 8 through 18.

In Exception 19, Respondent takes exception to the findings of fact in Paragraph 47 of the Recommended Order, arguing that the findings of fact are not based on competent, substantial evidence because Respondent objected to the reasonableness of Petitioner's costs by seeking offset. Respondent's argument is nonsensical because the ALJ clearly states in Paragraph 48 of the Recommended Order that "Respondent asserted that an offset should be applied to reduce any award of Petitioner's costs by what would be, in effect, a discovery sanction." Furthermore, in Exception 19, Respondent admits that it "presented no evidence to dispute the expense proposed by Petitioner." Thus, there is no valid basis upon which the

Agency could reject or modify the findings of fact in Paragraph 47 of the Recommended Order. Therefore, the Agency denies Exception 19.

In Exception 20, Respondent takes exception to the findings of fact in Paragraph 48 of the Recommended Order, arguing that it "did not seek recovery sanctions at any given time," and "relied on Petitioner's proven integrity upon admitting its error and promising to correct the issue by seeking reimbursement." This is another attempt by Respondent to re-argue issues in this case in front of the Agency. The ALJ's findings of fact in Paragraph 48 of the Recommended Order are nothing more than a summarization of Respondent's Response to Petitioner's Notice of Filing that was filed with DOAH on January 26, 2012. Since Respondent does not argue that these findings are not based on competent, substantial evidence, the Agency has no grounds for rejecting or modifying them. Therefore, the Agency denies Exception 20.

In Exception 21, Respondent takes exception to the findings of fact in Paragraph 49 of the Recommended Order, arguing that "[t]he competent and substantial evidence does not establish and it is not clear from the finding of fact whether the ALJ is saying that Petitioner's counsel failed to comply with the promise to seek reimbursement for Respondent's expenses due to reliance on Petitioner counsel or that the agency denied the expenses." As is the case with the ALJ's findings of fact in Paragraph 48 of the Recommended Order, the findings of fact in Paragraph 49 of the Recommended Order are also a summarization of Respondent's Response to Petitioner's Notice of Filing that was filed with DOAH on January 26, 2012. Respondent is once again re-arguing this issue in front of the Agency. Because the findings of fact in Paragraph 49 of the Recommended Order are based on competent, substantial evidence, the Agency must deny Exception 21.

In Exception 22, Respondent takes exception to the findings of fact in Paragraph 50 of the Recommended Order. Based on the reasoning set forth in the rulings on Exceptions 20 and 21 supra, the Agency denies Exception 22.

In Exceptions 23 through 26, Respondent takes exception to the conclusions of law in Paragraphs 59 through 62 of the Recommended Order. The conclusions of law in these paragraphs are the direct result of the ALJ's weighing of the competent, substantial evidence that was presented in this case. "Where issues 'are determinable by ordinary methods of proof through the weighing of evidence and the judging of the credibility of witnesses,' they are 'solely the prerogative of the hearing officer as finder of fact.' " B.B. v. Department of Health & Rehabilitative Servs., 542 So.2d 1362, 1364 (Fla. 3d DCA 1989) (quoting Holmes v. Turlington, 480 So.2d 150, 153 (Fla. 1st DCA 1985). Thus, the Agency cannot reject or modify them. Therefore, the Agency must deny Exceptions 23 through 26.

In Exceptions 27 and 28, Respondent takes exception to the conclusions of law in Paragraphs 65 and 66 of the Recommended Order. Based on the ruling on Exception 5 supra, the Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraphs 65 and 66 of the Recommended Order, it cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency denies Exceptions 27 and 28.

In Exceptions 29 and 30, Respondent takes exception to the conclusions of law in Paragraphs 71 and 72 of the Recommended Order. Respondent argues that the conclusions of law are "mixed with findings of fact and unclear propositions." Whatever the conclusions of law may or may not be mixed with is irrelevant to whether the Agency can reject or modify them. Although, they are within the Agency's substantive jurisdiction because the Agency is the single

state agency in charge of administering Florida's Medicaid program, the Agency does not disagree with the ALJ's interpretations of the relevant statutory provisions and cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. Furthermore, Respondent's argument in Exception 29 that "[i]t does not follow that if the head of the agency must make a finding of no imposition of fine, and the administrator states that the procedure is to 'administer sanctions on everybody,' that the agency head has the opportunity to declare that the fines are not in the best interest of the Medicaid program on a case by case basis" is erroneous. Respondent does not appear to understand that a sanction does not become final until the Agency enters a final order upholding the FAR. These final orders are signed by the Secretary of the Agency, or her designee, who can, at that point in time, find that the imposition of a sanction is not in the best interests of the Medicaid program and thus reverse the Agency's initial decision to impose a sanction. What the ALJ concludes in Paragraph 72 of the Recommended Order is that Respondent has made no attempt whatsoever to put forth any evidence that the sanctions imposed in this matter were not in the best interests of the Medicaid program. Thus, the Agency's Secretary is not able to make such a decision in this case based on the record presented. Contrary to Respondent's assertion, the conclusions of law in Paragraph 72 of the Recommended Order are in concert with the Agency's interpretation of § 409.913(16), Fla. Stat., that was set forth in Ag. for Health Care Admin. v. Gonzalez, DOAH Case No. 10-0262MPI (DOAH Recommended Order November 23, 2010; AHCA Final Order February 2, 2011). Therefore, the Agency denies Exceptions 29 and 30.

In Exception 31, Respondent takes exception to the conclusions of law in Paragraph 73 of the Recommended Order, arguing that the Agency "can only arrive at the conclusion that Petitioner ultimately prevailed herein if it ignores what has been pointed out as error in the

foregoing exceptions." The Agency has specifically stated the reasons it cannot grant any of Respondent's exceptions in the rulings on Respondent's Exceptions 1 through 30 supra. Thus, the findings of fact and conclusions of law at issue in these exceptions stand, and lead to the ALJ's conclusions of law in Paragraph 73 of the Recommended Order that the Agency prevailed in this matter. As these are also conclusions of law based upon the ALJ's weighing of evidence, the Agency cannot reject or modify them. See the ruling on Exceptions 23 through 26 supra. Therefore, the Agency must deny Exception 31.

In Exception 32, the Respondent takes exception to the ALJ's Recommendation on Page 35 of the Recommended Order. However, there is no provision in section 120.57(1), Florida Statutes, that allows a party to take exception to an ALJ's recommendation. Thus, this is not a valid exception. That being said, the Agency does wish to address Respondent's contention that "AHCA should take notice that the Exhibits that AHCA submitted at hearing and which the ALJ accepted into the record, failed to redact the recipient's social security numbers; hence these are now public records." While neither party moved to seal the exhibits, these exhibits were returned to the Agency by ALJ when she issued her Recommended Order. Except for the reasons specified in federal law, the Agency is prohibited from disclosing any recipient information. See 42 U.S.C. § 1396a(a)(7); and 42 C.F.R. §§ 431.300 through 431.306. Thus, Respondent's assertion that they are now public records is erroneous. Respondent's other arguments are rejected based on the rulings on Exceptions 1 through 31 supra.

RULING ON MOTION TO STRIKE

In its Response to Respondent's Exceptions, Petitioner moved to strike Respondent's exceptions as being untimely filed. Rule 28-106.217(1), Florida Administrative Code, provides that:

> Parties may file exceptions to findings of fact and conclusions of law contained in recommended orders with the agency responsible for rendering final agency action within 15 days of entry of the recommended order except in proceedings conducted pursuant to Section 120.57(3), F.S. Exceptions shall identify the disputed portion of the recommended order by page number and paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record.

Respondent's exceptions to the Recommended Order were filed with the Agency Clerk on April 11, 2012[1], one day past the 15-day deadline. However, before the Agency can strike Respondent's exceptions it must give Respondent notice of its intent to strike Respondent's exceptions and give Respondent a reasonable opportunity to respond. See Hamilton County Bd. of County Com'rs v. State Dept. of Environmental Regulation, 587 So.2d 1378, 1390 (Fla. 1st DCA 1991). Instead of following that process, the Agency has decided to rule on the merits of Respondent's exceptions. Therefore, the Agency denies Petitioner's Motion to Strike.

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:

Respondent is required to repay $159,741.86 in Medicaid overpayments, plus interest at a rate of ten (10) percent per annum as required by § 409.913(25)(c), Fla. Stat., to the Agency for paid claims covering the period from January 1, 2007 through December 31, 2008. A fine of $3,500 is also imposed against Respondent. Lastly, costs in the amount of $4,087.19 are hereby assessed against Respondent pursuant to § 409.913(23)(a), Fla. Stat.

[1] The Agency Clerk did receive an email from Respondent's counsel on April 10, 2012, that had an electronic copy of the exceptions attached to it. However, the Agency does not accept documents filed via email.

Respondent shall make full payment of the overpayment, fine and costs 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.

DONE and ORDERED this 3 day of May, 2012, in Tallahassee, Florida.

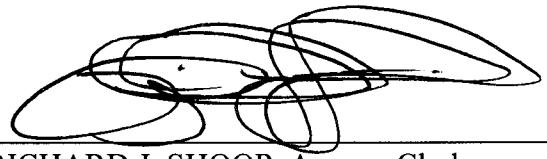
ELIZABETH DUDEK, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

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 4th day of May, 2012.



RICHARD J. SHOOP, Agency Clerk
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