

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION AGENCY CLERK

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STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Petitioner,

v.

ALFRED IVAN MURCIANO, M.D.,

Respondent.

DOAH CASE NO. 13-0795MPI

C.I. NO. 12-0421-000

RENDITION NO.: AHCA-14-0687 -FOF-MDO

PARTIAL FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), Todd P. Resavage, issued a Recommended Order after conducting a formal hearing. At issue in this proceeding is whether the Agency for Health Care Administration (“Agency”) is entitled to recover alleged Medicaid overpayments from Respondent for services rendered to Medicaid recipients from September 1, 2008 to August 31, 2010, and whether sanctions and costs should be imposed on Respondent. The Recommended Order dated May 22, 2014, is attached to this Partial Final Order and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

Petitioner filed exceptions to the Recommended Order.

In determining how to rule upon Petitioner’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)(I), 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. . . .

§ 120.57(1)(l), Fla. Stat. Additionally, “[t]he final order shall include an explicit ruling on each exception, but 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.”

§ 120.57(1)(k), Fla. Stat. In accordance with these legal standards, the Agency makes the following rulings on Petitioner’s exceptions:

In its sole exception to the Recommended Order, Petitioner takes exception to the conclusions of law in Paragraphs 33 and 34 of the Recommended Order. Petitioner argues that the ALJ’s conclusion that Petitioner’s peer reviewer was not a “peer” as defined by Section 409.9131(2), Florida Statutes, is erroneous. Petitioner further argues that, assuming arguendo, Petitioner’s peer reviewer did not meet the definition of a “peer” under Section 409.9131(2), Florida Statutes, the ALJ failed to address other grounds upon which the overpayment determination was based that did not necessitate peer review under that statute. It is unnecessary to address Petitioner’s second argument because the ALJ’s conclusion that Petitioner’s peer reviewer did not meet the definition of a “peer” under Section 409.9131(2), Florida Statutes, is incorrect. The undisputed factual findings demonstrate that Dr. O’Hern is a “peer” of Respondent as defined by section 409.9131(2), Florida Statutes. The statute does not require the

Agency's peer to be a carbon copy of Respondent, as the ALJ concluded. Rather, the Agency interprets Section 409.9131(2)(c), Florida Statutes, to mean that the peer must practice in the same area as Respondent, hold the same professional license as Respondent, and be in active practice like Respondent. This interpretation is reasonable, and should have been given deference by the ALJ. Dr. O'Hern is indeed a "peer" of Respondent under the Agency's interpretation of Section 409.9131(2)(c), Florida Statutes, because he too has a Florida medical license, is a pediatrician and had an active practice at the time he reviewed Respondent's records. That Dr. O'Hern did not hold the same certification as Respondent, or have a professional practice identical to Respondent in no way means he is not a "peer" of Respondent. Had the ALJ given such deference to the Agency's interpretation, he would have seen that Dr. O'Hern was adequately competent to address the issues involved with each claim, and should have fairly weighed his testimony against Respondent's on the claims at issue instead of dismissing the case entirely. Thus, the Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraphs 33 and 34 of the Recommended Order because it is the single state agency charged with administering Florida's Medicaid program, and that it can substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency grants Petitioner's exception and modifies Paragraphs 33 and 34 as follows:

33. The Florida Legislature has designed a statutory framework for reviewing potential Medicaid overpayments to a physician. Petitioner must seek to obtain a Florida licensed physician, to the maximum extent possible, of the same specialty or subspecialty to conduct the peer review. ~~Respondent argues, and the undersigned concludes, that b~~Based upon the above-findings of fact, Dr. O'Hern is ~~not~~ Respondent's "peer" as the term is defined in section 409.9131(2)(c).

34. Having concluded that Dr. O'Hern ~~was not~~ is a statutorily-defined peer of Respondent, it follows that an appropriate peer review was ~~not~~ performed before formal proceedings (the FAR) were initiated against Respondent, as required by section

~~409.9131(5)(b). This failure to satisfy a condition precedent to initiating formal proceedings is fatal to the agency's case and requires that the case be dismissed.~~

The modifications to Paragraphs 33 and 34 of the Recommended Order do not bring an end to this matter. Instead, they necessitate a remand of this matter back to the Division of Administrative Hearings for further fact-finding on each claim at issue. As the court in Cohn v. Department of Professional Regulation, 477 So. 2d 1039, 1047 (Fla. 3d DCA 1985), stated “there is no authority for any agency to make an independent determination of disputed fact in a review proceeding like this under any circumstances.” Rather, “[w]hen the entity charged with finding facts upon the evidence presented, the hearing officer, has, for whatever reason, failed to perform this function, the appropriate remedy is not for the agency (or the court of appeal) to reach its own conclusion, but rather to remand for the hearing officer to do so.” Id. Thus, the Agency needs the ALJ to make factual determinations on all of the claims the parties stated are in dispute in order to bring finality to this matter.

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, except where noted supra.

IT IS THEREFORE ADJUDGED THAT:

This matter is hereby remanded back to the Division of Administrative Hearings in order for the ALJ to make factual findings regarding all the claims at issue in this matter with the understanding that Dr. O'Hern is a “peer” of Respondent as defined by Section 409.9131(2)(c), Florida Statutes.

DONE and ORDERED this 31 day of July, 2014, in Tallahassee,
Florida.


ELIZABETH DUDEK, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Partial Final Order
has been furnished by U.S. or interoffice mail to the persons named below on this 31st day of
July, 2014.



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