

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Petitioner,

vs.

Case No. 14-3218MPI

JRM PHARMACY, INC., d/b/a SUPER
DRUGS PHARMACY,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz for final hearing on October 23, 2014, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Debora E. Fridie, Esquire
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For Respondent: Anthony Vitale, Esquire
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STATEMENT OF THE ISSUES

Whether Petitioner, Agency for Health Care Administration ("AHCA"), is entitled to recoup from Respondent, JRM Pharmacy,

Inc., d/b/a Super Drugs Pharmacy ("JRM"), \$156,657.05 as Medicaid overpayments; and whether investigative, legal, expert witness costs, and fines should be imposed against JRM.

PRELIMINARY STATEMENT

Following an audit of JRM's Medicaid billing for the period of January 1, 2010, through December 31, 2010, AHCA issued a Final Audit Report ("FAR") on December 13, 2013. In the FAR, AHCA determined that JRM received \$156,657.05 in Medicaid overpayments. The FAR informed JRM that AHCA intended to recoup the overpayment, impose a fine of \$21,000, and seek recovery of its costs as authorized by statute.

JRM timely requested an administrative hearing to contest the FAR, and on January 10, 2014, this case was forwarded to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the final hearing. This matter was initially assigned DOAH Case No. 14-0197MPI. On January 16, 2014, the parties filed a Joint Motion to Remand and Relinquish Jurisdiction without Prejudice based on their attempts to amicably resolve the matter. On January 16, 2014, the undersigned entered an Order granting the parties' motion, closing the file, and relinquishing jurisdiction to AHCA.

On July 15, 2014, AHCA filed a Motion to Reopen Proceedings based on the parties' failure to reach a settlement. On July 15,

2014, the undersigned entered an Order Re-opening File, and this matter was reassigned DOAH Case No. 14-3218MPI.

On July 24, 2014, a Notice of Hearing was issued by the undersigned setting this matter for a final hearing on October 23, 2014. Before the final hearing, the parties submitted a Joint Prehearing Stipulation, in which they stipulated to a number of facts. These agreed facts are incorporated into the Findings of Fact below, to the extent relevant.

The final hearing commenced as scheduled on October 23, 2014, with both parties present. At the hearing, AHCA presented the testimony of Ramona Stewart and Kathy Herold. JRM offered the deposition testimony of Blanca Leyva, in lieu of her in-person testimony.^{1/} AHCA's Exhibits 1 through 9 were received into evidence based upon the stipulation of the parties.

At the hearing, the parties requested that proposed recommended orders be filed within 14 days after the filing of the final hearing transcript. The final hearing Transcript was filed on November 10, 2014. On November 14, 2014, the parties filed an agreed motion to extend the deadline for the parties to file proposed recommended orders until December 19, 2014. On November 17, 2014, the undersigned entered an Order granting the motion. The parties timely filed proposed recommended orders,

which were given consideration in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2009 Florida Statutes.^{2/}

FINDINGS OF FACT

1. AHCA is the designated state agency responsible for administering the Medicaid Program in Florida.

2. At all times material to this case, JRM has been a licensed pharmacy and authorized Medicaid provider pursuant to a Medicaid Provider Agreement with AHCA. The Medicaid Provider Agreement is a voluntary contract between AHCA and JRM. JRM's Medicaid provider number is 102451500.

3. As an enrolled Medicaid provider, JRM is subject to the duly-enacted federal and state statutes, regulations, rules, policy guidelines, Medicaid provider publications, and the Medicaid Provider Agreement between it and AHCA.

4. At all times during the audit period, JRM was required to follow the Florida Medicaid Prescribed Drugs, Services, Coverage, Limitations, and Reimbursement Handbook ("Prescribed Drugs Services Handbook").

5. This case involves a Medicaid audit by AHCA of JRM as to dates of service from January 1, 2010, through December 31, 2010 ("audit period").

6. AHCA's Bureau of Medicaid Program Integrity ("MPI"), pursuant to its statutory authority, conducted an audit of JRM of paid Medicaid claims for medical goods and services to Medicaid recipients which occurred during the period from January 1, 2010, through December 31, 2010.

7. The audit included a comparison of the amount of prescription medications billed to Medicaid by JRM during the audit period with the units of the corresponding medications JRM purchased from licensed wholesalers.

8. The audit concluded that JRM was overpaid a total of \$156,657.05 for various prescription medications it billed to AHCA and received payment from AHCA. The claims which make up the overpayment alleged by AHCA of \$156,657.05 were filed and paid by AHCA prior to the institution of this matter.

9. JRM does not dispute that it was overpaid \$43,890.02 for various prescription medications, and JRM concedes that AHCA is entitled to recover this amount as an overpayment.

10. However, JRM disputes the remaining balance of AHCA's alleged overpayment of \$112,767.03, which AHCA attributes to an overpayment to JRM for the brand named prescription drug Prevacid 30 mg Capsule DR ("Prevacid").

11. The audit involved a review of JRM's purchases of Prevacid from McKesson, and Lansoprazole from Bellico, the authorized wholesalers, during the audit period. The audit

established that JRM billed to AHCA and received payment from AHCA for more Prevacid than JRM had available during the audit period to dispense to Medicaid recipients. Specifically, the persuasive evidence adduced at hearing demonstrates JRM was overpaid \$112,767.03 for Prevacid.

12. When a Medicaid pharmacy provider submits a claim to Medicaid for payment, Medicaid identifies the prescription drug on the claim by the National Drug Code ("NDC").

13. The generic form of Prevacid is Lansoprazole. Prevacid and Lansoprazole have different NDC numbers. JRM was required to submit the entire 11-digit NDC number for the actual product dispensed on the claim.

14. During the audit period, JRM billed to Medicaid and was paid by Medicaid for "NDC: 00300304613 PREVACID 30 MG CAPSULE DR, NDC: 00300304619 PREVACID 30 MG CAPSULE DR, AND NDC: 64664004613 PREVACID DR 30 MG CAPSULE."

15. The persuasive evidence adduced at hearing demonstrates that JRM billed Medicaid and was paid by Medicaid for 31,650 Prevacid capsules. However, JRM only purchased 10,907 units of Prevacid, leaving a shortage of 20,744 capsules of Prevacid and an overpayment of \$112,767.03. Thus, JRM received payment from Medicaid for \$112,767.03 for Prevacid that JRM did not purchase and did not dispense to Medicaid recipients.

16. There is a significant cost difference between the brand name Prevacid and generic Lansoprazole, with the brand name Prevacid being billed at a much higher rate than the generic Lansoprazole. JRM purchased a large amount of Lansoprazole from Bellco during the audit period, but billed and received payment from Medicaid for Prevacid.

17. Only prescription drugs that are on the Florida Medicaid Preferred Drug List are allowed to be paid for by Medicaid. During the audit period, generic Lansoprazole was not on AHCA's preferred drug list. However, Prevacid was on AHCA's preferred drug list. JRM often dispensed Lansoprazole and billed and received payment from Medicaid for dispensing Prevacid.

CONCLUSIONS OF LAW

18. DOAH has jurisdiction over the parties hereto and the subject matter of this proceeding. §§ 120.569 & 120.57(1), Fla. Stat.

19. AHCA is empowered to "recover overpayments . . . as appropriate." § 409.913, Fla. Stat. An "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." § 409.913(1)(e), Fla. Stat.

20. As the party asserting the overpayments, AHCA bears the burden to establish the alleged overpayments by a preponderance

of the evidence. Southpointe Pharmacy v. Dep't of HRS, 596 So. 2d 106, 109 (Fla. 1st DCA 1992).

21. The statutes, rules, and the Medicaid provider handbooks in effect during the audit period govern the outcome of this dispute.

22. The Florida Medicaid Prescribed Drugs, Services, Coverage, Limitations, and Reimbursement Handbook, May 2008, is incorporated by reference into Florida Administrative Code Rule 59G-4.250(2). The rule provides that: "All participating prescribed drug services providers enrolled in the Medicaid program must be in compliance with the provisions of the Florida Medicaid Prescribed Drug Services Coverage, Limitations, and Reimbursement Handbook, updated May 2008, which is incorporated by reference."

23. Section 409.913(7), Florida Statutes, further provides:

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 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.

* * *

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

24. "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." § 409.913(9), Fla. Stat.

25. The Prescribed Drugs Services Handbook, page 3-1, explains the NDC and the requirements for including it on a submitted claim as follows:

NATIONAL DRUG CODE

Description: Drugs are identified on Medicaid claims and the Medicaid computer system drug file by the National Drug Code (NDC). The NDC is an 11-digit number. The first 5 digits identify the manufacturer or supplier, the next 4 digits identify the product, and the last 2 digits identify the package size.

Using NDCs: The provider must enter the entire 11-digit NDC for the actual product dispensed on the claim. Billing an NDC number other than the one for the product dispensed is a false claim and a violation of Medicaid policy.

NDC Code Not On the Drug File: Medicaid can only reimburse drugs whose NDC codes are on

the Medicaid drug file. If the NDC code is not on the Medicaid drug file, the provider can call Medicaid's Bureau of Pharmacy Services at 850-487-4441, for information. If Medicaid adds the drug to the file, the provider can be reimbursed for dispensing the drug.

Drugs Unlawfully Acquired: Medicaid will only reimburse those drugs that are lawfully acquired from entities licensed in accordance with Chapter 499, Florida Statutes.

26. Section 409.913(22) states, in pertinent part, that:

(22) The audit report, supported by agency work papers, showing an overpayment to a provider constitutes evidence of the overpayment. A provider may not present or elicit testimony on direct examination or cross-examination in any court or administrative proceeding, regarding the purchase or acquisition by any means of drugs, goods, or supplies; sales or divestment by any means of drugs, goods or supplies; or inventory of drugs, goods, or supplies, unless such acquisition, sales, divestment, or inventory is documented by written invoices, written inventory records, or other competent written documentary evidence maintained in the normal course of the provider's business. A provider may not present records to contest an overpayment or sanction unless such records are contemporaneous and, if requested during the audit process, were furnished to the agency or its agent upon request. This limitation does not apply to Medicaid cost report audits. This limitation does not preclude consideration by the agency of addenda or modifications to a note if the addenda or modifications are made before notification of the audit, the addenda or modifications are germane to the note, and the note was made contemporaneously with a patient care episode. Notwithstanding the applicable rules of discovery, all documentation to be

offered as evidence at an administrative hearing on a Medicaid overpayment or an administrative sanction must be exchanged by all parties at least 14 days before the administrative hearing or be excluded from consideration.

27. Turning to the instant case, AHCA proved by a preponderance of the evidence that JRM billed Medicaid and was paid by Medicaid for 31,650 Prevacid capsules. However, JRM only purchased 10,907 units of Prevacid, leaving a shortage of 20,744 capsules of Prevacid and an overpayment of \$112,767.03. Thus, JRM received payment from Medicaid for \$112,767.03 for Prevacid that JRM did not purchase and did not dispense to Medicaid recipients.

28. JRM does not dispute that it was overpaid \$43,890.02 for various other prescription medications, and JRM concedes that AHCA is entitled to recover this amount as an overpayment.

29. Thus, AHCA is entitled to recoup the sum of \$156,657.05 as Medicaid overpayments during the audit period.

30. As to the issue of fines, AHCA must carry the burden of proof with respect to the imposition of fines by the clear and convincing evidence standard. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

31. Fines on overpayments in this case are limited by the 2008 version of Florida Administrative Code Rules 59G-9.070(7) and (10). Rule 59G-9.070(7) states:

(7) SANCTIONS: Except when the Secretary of the Agency determines not to impose a sanction, pursuant to Section 409.913(16) (j), F.S., sanctions shall be imposed for the following:

* * *

(n) During a specific audit or review period, failure to demonstrate sufficient quantities of goods, or sufficient time in the case of services, that support the corresponding billings or claims made to the Medicaid program. [Section 409.913(15) (n), F.S.]

Under subsection (10), entitled "GUIDELINES FOR SANCTIONS," rule 59G-9.070(10) (i) provides for a \$5,000.00 fine for the first violation. Thus, an appropriate fine in this case of first offense is \$5,000.00.^{3/}

32. In the FAR, AHCA requested investigative, legal, and expert witness costs pursuant to section 409.913(23) (a). However, AHCA acknowledges in its Proposed Recommended Order that it would be improper for the undersigned to award such costs at this juncture. Rather, any determination of the amount of costs by the undersigned is necessarily dependent upon a final order issued by AHCA indicating that AHCA "ultimately prevailed"; a determination of the amount of costs by AHCA in the final order; and any dispute of the amount of costs by JRM.

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 of recoupment of a Medicaid overpayment from JRM in the amount of \$156,657.05; impose a fine of \$5,000.00; and remand this matter to the undersigned for a determination of the amount of investigative, legal, and expert witness costs, should a final order be entered by AHCA indicating that AHCA ultimately prevailed, and if there is any dispute as to the amount of such costs following the issuance of the final order by AHCA.

DONE AND ENTERED this 13th day of January, 2015, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of January, 2015.

ENDNOTES

^{1/} At the final hearing, the parties stipulated that Ms. Leyva was unavailable for the final hearing.

^{2/} The audit period involved both the 2009 and 2010 versions of the Florida Statutes. Because there were no substantive changes to the operative provisions of section 409.913, Florida Statutes,

in 2010, the undersigned will refer to the 2009 version of the Florida Statutes unless otherwise indicated.

^{3/} In the FAR, AHCA sought an administrative fine in the amount of \$21,000.00 based on amendments to rule 59G-9.070 that went into effect on September 7, 2010. Rule 59G-9.070(7)(n), effective September 7, 2010, provides, in pertinent part:

(n) For shortages of goods: For a first offense, \$1,000 fine per type of good found to be short.

In its Proposed Recommended Order, however, AHCA now concedes that a reduced fine in the amount of \$5,000.00 is appropriate pursuant to the 2008 version of rule 59G-9.070(7)(n).

JRM argues that the fine should be reduced to \$2,500.00 based on an overpayment in the amount of \$43,890.50. However, JRM does not provide any legal authority for the undersigned to impose a fine in this specific proposed amount.

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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.