STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RANDY R. WILLOUGHBY,

Petitioner,

vs. Case No. 15-3276MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER ON REMAND

On September 29, 2017, a final hearing on remand was held in this case before J. Lawrence Johnston, an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH). It was conducted using video teleconferencing between Tampa and Tallahassee.

APPEARANCES

For Petitioner: Brandon Cathey, Esquire
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For Respondent: Elizabeth A. Teegen, Esquire
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STATEMENT OF THE ISSUE

The issue is the amount of Petitioner's personal injury settlement proceeds that should be paid to the Agency for Health

Care Administration (AHCA) to satisfy its Medicaid lien under section 409.910, Florida Statutes (2017).

PRELIMINARY STATEMENT

This matter initially proceeded to a final hearing on August 11, 2015. On October 7, 2015, ALJ William F. Quattlebaum entered a Final Order holding that AHCA was entitled to reimbursement of its entire claimed Medicaid lien ($147,019.61) from the Petitioner's settlement proceeds. The Petitioner appealed. On March 10, 2017, the Second District Court of Appeal (Second DCA) issued an opinion reversing in part and remanding for additional proceedings. Willoughby v. Ag. for Health Care Admin., 212 So. 3d 516 (Fla. 2d DCA 2017), review dismissed, SC17-660, 2017 Fla. LEXIS 1833 (Fla. Sept. 13, 2017).

Specifically, the Second DCA affirmed the part of the Final Order that extended AHCA's lien to the $3.99 million recovered on account of the bad faith failure of 21st Century Centennial Insurance Company (21st Century) to pay the Petitioner's uninsured motorist claim. Id. at 521. However, it reversed the part of the Final Order that granted AHCA full reimbursement, holding: that AHCA could only satisfy its lien from the settlement funds allocable to past medical expenses; that the ALJ improperly ignored the parties' stipulation that the Petitioner recovered less than $147,019.61 for past medical expenses; and that the Petitioner proved by clear and convincing evidence that

a lesser portion of the settlement funds should be allocated to satisfy the Medicaid lien. Id. The Court remanded "for the ALJ to reconsider, consistent with this opinion, Mr. Willoughby's petition in light of the parties' stipulation as to the apportionment of the settlement for Mr. Willoughby's past medical expenses." The Second DCA also certified conflict with the decision of the First DCA in Giraldo v. Agency for Health Care Administration, 208 So. 3d 244 (Fla. 1st DCA 2016), which upheld a DOAH final order that AHCA could satisfy its lien from the settlement funds allocable to past and future medical expenses.

Based on the Second DCA's opinion and mandate, this case was re-opened by the undersigned (ALJ Quattlebaum having retired), and the parties were ordered to report whether the case should be held in abeyance pending a decision by the Supreme Court of Florida as to the certified conflict. The parties requested an abeyance, which was granted. The abeyance was lifted when AHCA voluntarily dismissed its petition to invoke the jurisdiction of the Supreme Court. The hearing on remand was then scheduled.

At the hearing on remand, the evidentiary record from the hearing on August 11, 2015, was supplemented by the testimony of Brandon Cathey, who is the Petitioner's personal injury attorney. Mr. Cathey also sponsored the Petitioner's proposed Exhibits 40 and 41. AHCA objected to the additional exhibits and parts of Mr. Cathey's testimony on the ground that they were not

authorized by the Second DCA's remand. Specifically, AHCA contends that the remand did not authorize consideration of either an additional third-party recovery obtained by the Petitioner since the hearing on August 11, 2015, or the attorneys' fees and costs incurred by the Petitioner in obtaining the third-party recoveries, since the Petitioner did not ask that they be considered during the hearing on August 11, 2015. AHCA's objections are addressed in the Conclusions of Law, infra.

After the hearing on remand, the Transcript was filed, and the parties filed proposed final orders that have been considered.

FINDINGS OF FACT

1. ALJ Quattlebaum's Final Order entered on October 7, 2015, found that the Petitioner had recovered $4,020,000 from third parties as a result of terrible injuries suffered in a car crash. Since then another $100,000 has been recovered from Government Employees Insurance Company (GEICO), representing the bodily injury liability limit on a policy held by the driver whose negligence caused the crash. One more claim, against the wife of the negligent driver, remains pending in court.

2. As found by ALJ Quattlebaum, the full monetary value of all of the Petitioner's damages from the car crash is at least $10 million.

3. To date, the Petitioner has incurred a total of $1,808,000.00 in attorneys' fees and $106,240.79 in costs, which the Petitioner has paid to his attorney out of settlement proceeds.

4. As found by ALJ Quattlebaum, the Petitioner's past medical expenses are $147,019.61, all of which was paid by Medicaid and represents AHCA's full lien claim.

CONCLUSIONS OF LAW

5. AHCA takes the position that the Second DCA's remand did not authorize consideration of either the additional $100,000 GEICO settlement obtained by the Petitioner since the hearing on August 11, 2015, or a possible reduction of AHCA's Medicaid lien based on the attorneys' fees and costs incurred by the Petitioner in obtaining the third-party recoveries, which was not requested during the hearing on August 11, 2015. To the contrary, the Second DCA's remand was for the ALJ to "reconsider, consistent with this opinion, Mr. Willoughby's petition in light of the parties' stipulation that the Petitioner recovered less than $147,019.61 for past medical expenses." The remand is broad enough to allow consideration of those matters. See Wolfe v. Nazaire, 758 So. 2d 730 (Fla. 4th DCA 2000). AHCA's objection to the Petitioner's Exhibits 40 and 41 are overruled, and those exhibits are received in evidence.

6. That said, consideration of those matters has little impact. First, the GEICO settlement adds less than 2.5 percent to the recovery amount, and matters relatively little in determining how much of the total recovery amount should be allocated to AHCA's lien claim. To the extent that the GEICO settlement matters, it actually results in a pro rata increase in the amount of money payable to AHCA's lien. Second, consideration of attorneys' fees and costs does not alter the amount of the recovery that should be allocated to past medical expenses. See Conclusions 10 through 13, infra.

7. As concluded by ALJ Quattlebaum, AHCA would be entitled to the full amount of its lien claim under section 409.910(11)(f), Florida Statutes. Under that statute, AHCA is entitled to reimbursement of the full amount of its Medicaid expenditures, up to a maximum calculated by reducing the total recovery by taxable costs and attorneys' fees calculated as 25 percent of the recovery, and halving the remainder of the recovery. In this case, the statutory formula's maximum would be half of ($4,120,000, minus $106,240.79 in costs, minus $1,030,000 for attorneys' fees, for a total of $2,983,759.21), which is $1,491,879.61. The full amount of AHCA's claimed lien is well within the statutory maximum.

8. Section 409.910(17)(b) allows a Medicaid recipient to rebut the statutory maximum calculated under section

409.910(11)(f) by proving, "by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f) or that Medicaid provided a lesser amount of medical assistance than that asserted by the agency." The Second DCA's opinion strikes future medical expenses from consideration. In addition, since the DCA's opinion, a gloss has been placed on section 409.910(17)(b) to reduce the standard of proof from "clear and convincing" to a "preponderance of the evidence" in order to harmonize the statute with recent federal court decisions. See Museguez v. Ag. for Health Care Admin., Case No. 16-7379MTR (Fla. DOAH Sept. 19, 2017). This gloss is preferable, in the opinion of this ALJ, to the holding in Smathers v. Agency for Health Care Administration, Case No. 16-3590MTR (Fla. DOAH Sept. 13, 2017), that DOAH no longer has jurisdiction in light of the federal decisions.

9. Applying the modifications to section 409.910(17)(b), the Petitioner has proven, by a preponderance of the evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past medical expenses than the amount calculated under section 409.910(11)(f). Instead of the full amount of the lien claim, or $147,019.61, a lesser amount should be allocated to AHCA's lien. Based on the evidence, there is no

reason not to determine that the lien amount should be reduced to 41.2 percent of the claimed amount, which is the percentage of the full amount of the Petitioner's damages ($10,000,000) represented by the Petitioner's third-party recoveries ($4,120,000), or $60,572.08.

10. The Petitioner argues for a further reduction of AHCA's lien by subtracting AHCA's pro rata share of the Petitioner's attorneys' fees and costs, which the Petitioner calculates to be $27,458. The argument has some appeal, because AHCA received some benefit (to the extent of its Medicaid lien) from the Petitioner's expenditures for attorneys' fees and costs. However, there is no sound legal basis for a further reduction.

11. Under federal law, Medicaid is the payor of last resort and must be repaid in full from third-party benefits, regardless whether a recipient is made whole. See 42 U.S.C. § 1396a(a)(25)(B) and (H) and 1396k(a)(1)(A) and (b). Section 409.910(1) recognizes and complies with the federal law. However, this requirement is at odds with other federal law—specifically, 42 U.S.C. § 1396p(a)(1), also known as the Anti-Lien Statute—which prohibits states from imposing a lien against the property of a Medicaid recipient prior to the death of the recipient. Case law has harmonized these statutes by holding that a state can only recover its Medicaid expenditures from the portions of a third-party recovery that are allocated to medical

expenses. See Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268 (2006). Sections 409.910(11)(f) and 409.910(17)(b) reflect Florida's most recent effort to comply with the federal law.

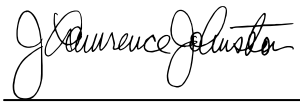
12. The amounts spent by the Petitioner on attorneys' fees and costs were part of his third-party recovery. Since they were allocated to something other than (past) medical expenses, those sums already have been protected from the imposition of AHCA's Medicaid lien. They should not be double-counted, even on a pro rata basis, to further reduce the amount of AHCA's lien.

13. The Petitioner cites Quesada v. Agency for Health Care Administration, Case No. 15-3764MTR (Fla. DOAH Jan. 28, 2016), as a case where a further reduction was ordered for attorneys' fees and costs. Quesada based the reduction on the incorporation of a "carve-out" for attorneys' fees and costs in the formula for calculating the statutory maximum Medicaid lien in section 409.910(11)(f), on "carve-outs" by courts dealing with statutes in other states that specified "above-the-line" treatment of those expenditures, and on the notion that "above-the-line" treatment of those expenditures is appropriate "because they produce the settlement or judgment proceeds." Id. at 42. Nonetheless, using the Quesada rationale to graft an attorneys' fees and costs "carve-out" onto section 409.910(17)(b) would be contrary to law, in the opinion of this ALJ.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is determined and ordered that the amount of AHCA's Medicaid lien payable from the Petitioner's third-party recoveries is $60,572.08.

DONE AND ORDERED this 4th day of December, 2017, in Tallahassee, Leon County, Florida.



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COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.