STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES T. STIRK,

Petitioner,

vs. Case No. 16-2768MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Lynne A. Quimby-Pennock, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted an administrative hearing in this matter on July 1, 2016, by video teleconference at sites in Fort Myers and Tallahassee, Florida.

APPEARANCES

For Petitioner: James M. Scarmozzino, Esquire[1/]
Webb & Scarmozzino, P.A.
Second Floor
2121 West First Street
Fort Myers, Florida 33901

For Respondent: Alexander R. Boler, Esquire
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2073 Summit Lake Drive
Tallahassee, Florida 32317

STATEMENT OF THE ISSUE

The issue is the amount payable to Respondent, Agency for Health Care Administration (AHCA), in satisfaction of Respondent's Medicaid lien from a settlement received by

Petitioner, James T. Stirk, from a third party pursuant to section 409.910, Florida Statutes (2015).

PRELIMINARY STATEMENT

On May 20, 2016, Petitioner filed a Petition to Determine Amount Payable to the Agency for Health Care Administration in Satisfaction of Medicaid Lien. Mr. Stirk challenged AHCA's lien for the recovery of medical expenses paid by Medicaid in the amount of $32,062.25, after applying the statutory formula. The basis for the challenge was the assertion that the application of section 409.910(17)(b), warranted reimbursement of a lesser portion of the total third-party settlement proceeds than the amount calculated by Respondent pursuant to the formula established in section 409.910(11)(f).

The parties filed a Joint Pre-hearing Stipulation. The final administrative hearing in this matter was held on July 1, 2016, as scheduled. As appropriate, the facts stipulated therein are accepted and made a part of the Findings of Fact below.

Petitioner testified on his own behalf and presented the testimony of expert Ty Roland, Esquire. Petitioner's Exhibits[2/] Bates-stamped pages 0001 through 0289 were admitted into evidence without objection. Respondent did not present any witnesses or offer any exhibits for admission into evidence.

A one-volume Transcript of the proceeding was filed on July 28, 2016.[3/] The parties timely filed proposed final orders that have been carefully considered by the undersigned in the preparation of this Final Order.

All references to the Florida Statutes are to the 2015 version, unless otherwise noted.

FINDINGS OF FACT

1. On January 24, 2014, Petitioner, then 25 years old, was involved in a serious motorcycle accident. Petitioner struck the rear of a truck with a trailer near mile marker 129 on I-75 in Lee County, Florida.

2. Petitioner was taken to Lee Memorial Hospital where he remained in a coma for a couple of months. He sustained a broken back at T-4 level, two broken arms, a fractured neck and internal injuries.

3. As a result of his injuries, Petitioner is now a paraplegic from the chest down and confined to a wheelchair.

4. Respondent is the state agency authorized to administer Florida's Medicaid program. See § 409.902, Fla. Stat.

5. Prior to the accident, Petitioner worked as an appliance and air conditioning repairman, earning $16 an hour. After the accident and his recovery, Petitioner has been unable to work and his only source of income is through a Social Security disability check of approximately $1,083 monthly. He

believes he is now eligible for Medicare, which should start "next month" (August 2016). He rents a home ($750 monthly) and lives there with his four-year-old son.

6. Petitioner brought a negligence claim against the truck driver to recover his damages sustained in the crash. Petitioner settled his negligence claim for $95,000.00.

7. During the pendency of Petitioner's claim, AHCA was notified of the third-party negligence claim.

8. AHCA has not filed an action to set aside or otherwise object to Petitioner's $95,000.00 settlement.

9. Petitioner's past medical care related to his motorcycle accident totaled approximately $929,589.46.

10. Petitioner was insured under a Florida Blue ERISA Health Insurance Plan (Florida Blue) for a portion of the time he received medical treatment. He subsequently became eligible for Medicaid after being unable to work after the accident.

11. Florida Blue paid approximately $501,487.30 towards Petitioner's medical care.

12. Medicaid paid $47,008.81 towards Petitioner's medical care. No portion of this amount was paid for future medical expenses and no payments were made in advance for medical care.

13. By letter dated January 20, 2016, AHCA, through its contractor Xerox Recovery Services, asserted a lien of

$47,008.81 against Petitioner's third-party negligence claim and settlement thereof.

14. By letter dated January 21, 2016, Petitioner's counsel provided Xerox Recovery Services the settlement information and requested the Medicaid lien be proportionally reduced to $714.05, 1.9 percent of the total value of Petitioner's claim.

15. By letter dated February 18, 2016, AHCA, through its contractor, applied the statutory formula to Petitioner's gross settlement and requested a check in the amount of $32,062.25 for full satisfaction of its lien.

16. Petitioner's attorney forwarded payment of $32,062.25 from Petitioner's settlement proceeds. The payment of these funds to AHCA constitutes "final agency action" for purposes of chapter 120, Florida Statutes, pursuant to section 409.910(17).

17. Section 409.910(11)(f), provides, in pertinent part, as follows:

> (f) [I]n the event of an action in tort against a third party in which the recipient or his or her legal representative is a party which results in a judgment, award, or settlement from a third party, the amount recovered shall be distributed as follows:
>
> 1. After attorney's fees and taxable costs . . . one-half of the remaining recovery shall be paid to the agency up to the total amount of medical assistance provided by Medicaid.
>
> 2. The remaining amount of the recovery shall be paid to the recipient.

> 3. For purposes of calculating the agency's recovery of medical assistance benefits paid, the fee for services of an attorney retained by the recipient . . . shall be calculated at 25 percent of the judgement, award, or settlement.

18. Pursuant to the formula set forth in 409.910(11)(f), Respondent should be reimbursed $32,062.25, the amount set forth in the February 18, 2016, letter.

19. However, the statute provides a method by which a recipient may contest the amount designated as recovered medical expense damages payable to the agency pursuant to the formula set forth in subsection (11)(f). "In order to successfully challenge the amount payable to the agency, the recipient must prove, 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. § 409.910(17)(b), Fla. Stat.

20. The testimony spoke in generalities and global assessments. The testimony did not explicitly disclose that a lesser amount of the total recovery should be allocated for past and future medical expenses in this instance.

21. Ty Roland is an attorney with over 20 years' experience representing plaintiffs in personal injury and wrongful death claims. The majority of Mr. Roland's cases have been in the Fort Myers area.

22. Mr. Roland was accepted as an expert in the valuation of the damages (in personal injury cases), and testified as to his opinion of the total value of damages in Petitioner's underlying action. In formulating his opinion of the total value of Petitioner's damages, Mr. Roland considered cases he has previously tried. Petitioner's suit demanded $5 million; however, Mr. Roland estimated the value of Petitioner's suit at $10 million. There were no specifics as to the elements of damages.

23. Total recovery for Petitioner's damages through settlement was $95,000, roughly 1.9 percent of the estimated total value of his damages. The parties stipulated the amount due under section 409.910(11)(f) is $32,062.25.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings (DOAH) has jurisdiction over the subject matter and the parties in this case, and final order authority pursuant to sections 120.569, 120.57(1), and 409.910(17).

25. The Medicaid program "provide[s] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." Harris v. McRae, 448 U.S. 297, 301 (1980). Though participation is optional, once a State elects to participate in the Medicaid program, it must comply with federal requirements governing the same. Id.

26. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses incurred on behalf of beneficiaries who later recover from third-party tortfeasors. See Ark. Dep't of Health & Hum. Servs. v. Ahlborn, 547 U.S. 268, 276 (2006).

27. Consistent with this federal requirement, the Florida Legislature has enacted section 409.910, which authorizes and requires the State to be reimbursed for Medicaid funds paid for a recipient's medical care when that recipient later receives a personal injury judgment or settlement from a third party. Smith v. Ag. for Health Care Admin., 24 So. 3d 590 (Fla. 5th DCA 2009). The statute creates an automatic lien on any such judgment or settlement for the medical assistance provided by Medicaid. See § 409.910(6)(c), Fla. Stat.

28. The amount to be recovered for Medicaid medical expenses from a judgment, award, or settlement from a third party is determined by the formula in section 409.910(11)(f), which sets that amount at one-half of the total recovery, after deducting attorney's fees of 25 percent of the recovery and all taxable costs, up to, but not to exceed, the total amount actually paid by Medicaid on the recipient's behalf. Ag. for Health Care Admin. v. Riley, 119 So. 3d 514, 515 n.3 (Fla. 2d DCA 2013).

29. The administrative procedure created by section 409.910(17)(b) is the means for determining whether a lesser portion of a total recovery should be allocated as reimbursement for medical expenses in lieu of the amount calculated by application of the formula in section 409.910(11)(f).

30. Section 409.910(17)(b) provides in pertinent part:

> (b) A recipient may contest the amount designated as recovered medical expense damages payable to the agency pursuant to the formula specified in paragraph (11)(f) by filing a petition under chapter 120 within 21 days after the date of payment of funds to the agency or after the date of placing the full amount of the third-party benefits in the trust account for the benefit of the agency pursuant to paragraph (a). The petition shall be filed with the Division of Administrative Hearings. For purposes of chapter 120, the payment of funds to the agency or the placement of the full amount of the third-party benefits in the trust account for the benefit of the agency constitutes final agency action and notice thereof. Final order authority for the proceedings specified in [1]this subsection rests with the Division of Administrative Hearings. This procedure is the exclusive method for challenging the amount of third-party benefits payable to the agency. In order to successfully challenge the amount payable to the agency, the recipient must prove, 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.

> 1 Note.—As amended by s. 6, ch. 2013-48. The amendment by s. 2, ch. 2013-150, used the words "this section" instead of the words "this subsection."

31. Section 409.910(17)(b) makes it clear that the formula set forth in subsection (11) constitutes a default allocation of the amount of a settlement that is attributable to medical costs, and sets forth an administrative procedure for adversarial testing of that allocation. See Harrell v. State, 143 So. 3d 478, 480 (Fla. 1st DCA 2014)(adopting the holding in Riley that petitioner "should be afforded an opportunity to seek the reduction of a Medicaid lien amount established by the statutory default allocation by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses")(quoting Roberts v. Albertson's, Inc., 119 So. 3d 457, 465-466 (Fla. 4th DCA 2012), reh'g and reh'g en banc denied sub nom. Giorgione v. Albertson's, Inc., 2013 Fla. App. LEXIS 10067 (Fla. 4th DCA June 26, 2013)).

32. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). In Evans Packing Company v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116 n.5 (Fla. 1st DCA 1989), the Court defined clear and convincing evidence as follows:

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

33. Petitioner did not prove through clear and convincing evidence that a lesser amount than $32,062.25 should be allocated as reimbursement for past and future medical expenses.

ORDER

Upon consideration of the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED that:

The Agency for Health Care Administration is entitled to $32,062.25 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 23rd day of August, 2016, in Tallahassee, Leon County, Florida.

LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of August, 2016.

ENDNOTES

[1/] In Respondent's PRO, Respondent's counsel listed different counsel for Petitioner.

[2/] The parties claimed the exhibits were numbered 1 through 13, however, the undersigned has only found Bates-stamped pages 0001 through 0289.

[3/] Petitioner's Proposed Final Order incorrectly stated that the Transcript was filed on July 26, 2016. The certificate of service reflected the "Notice of Filing and Transcript [have] been e-filed with . . . on this 27th day of July, 2016"; however the Transcript was filed with the Division of Administrative Hearings on July 28, 2016 at 8:00 a.m.

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.