STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN GRAY,

Petitioner,

vs. Case No. 16-5582MTR

AGENCY FOR HEALTH CARE ADMINISTRATION, AND DEPARTMENT OF HEALTH BRAIN AND SPINAL CORD INJURY PROGRAM,

Respondents.
_____/

FINAL ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016),[1/] on October 26, 2016, by video teleconference with sites in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioner: Brandon G. Cathey, Esquire
Swope, Rodante P.A.
1234 East 5th Avenue
Tampa, Florida 33605

For Respondent: Alexander R. Boler, Esquire
Xerox Recovery Services
Suite 300
2073 Summit Lake Drive
Tallahassee, Florida 32317

STATEMENT OF THE ISSUE

The issue to be determined in this matter is the amount of money to be reimbursed to the Agency for Health Care Administration for medical expenses paid on behalf of Petitioner, John Gray, a Medicaid recipient, following Petitioner's recovery from a third-party.

PRELIMINARY STATEMENT

On September 23, 2016, Petitioner, a Medicaid recipient, filed a Petition to Determine the Amount Payable to the Agency for Health Care Administration (the "Agency") and Medicaid Health Maintenance Organizations in Satisfaction of Medicaid Lien ("Petition"), by which he challenged the Agency's lien for medical expenses following Petitioner's recovery from a third-party. The Agency seeks reimbursement of medical expenses paid by Medicaid on Petitioner's behalf based on an amount calculated using the formula established in section 409.910(11)(f), Florida Statutes. Petitioner asserts that reimbursement of a lesser portion of Petitioner's recovery is warranted pursuant to section 409.910(17)(b).

On September 26, 2016, the Division of Administrative Hearings ("DOAH") notified the Agency of Petitioner's Petition for an administrative proceeding to determine the amount payable to the Agency to satisfy the Medicaid lien.

The final hearing was held on October 26, 2016. At the final hearing, Petitioner's Exhibits 1 through 5 were admitted into evidence. The Agency did not offer any evidence. Neither party called witnesses to testify.

A court reporter recorded the final hearing. A one-volume Transcript of the proceeding was filed on December 2, 2016. At the close of the hearing, the parties were advised of a ten-day timeframe following DOAH's receipt of the Transcript to file post-hearing submittals. Both parties filed Proposed Final Orders which were duly considered in preparing this Final Order.

FINDINGS OF FACT

1. On January 18, 2007, Petitioner was involved in a devastating automobile accident. Another vehicle, driven by Damil Belizaire, crossed a median and collided head-on into the car Petitioner was driving. No evidence indicates that any negligence on the part of Petitioner caused or contributed to the accident or his injury.

2. Petitioner suffered catastrophic injuries from the collision, including a spinal cord injury resulting in paraplegia.

3. Following the accident, Petitioner was transported to UF Health Shands Hospital ("Shands") in Jacksonville, Florida. Petitioner remained in Shands receiving medical treatment for 77 days.

4. Once Petitioner became medically stable, he was transferred to the Brooks Rehabilitation Center ("Brooks") in Jacksonville, Florida. There, Petitioner received intensive physical and occupational therapy care. Petitioner remained at Brooks until June 1, 2007, when he was discharged. Petitioner is permanently paraplegic.

5. On April 7, 2008, Petitioner sued Mr. Belizaire seeking to recover his damages from the automobile accident. Petitioner's lawsuit was filed in the Circuit Court of the Fourth Judicial Circuit, in Duval County, Case No. 16-2008-CA-004366.

6. On April 1, 2013, Petitioner received a jury verdict in his favor and was awarded a Final Judgment against Mr. Belizaire in the amount of $2,859,120.56, including statutory interest. The damages award was allocated as follows:

a. $128,760.56 for past medical expenses;

b. $1,301,268.00 for future medical expenses;

c. $202,670.00 for the loss of earnings in the past;

d. $916,422.00 for loss of earning capacity in the future;

e. $50,000.00 for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, and loss of capacity for the enjoyment of life in the past; and

f. $260,000.00 for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, and loss of capacity for the enjoyment of life in the future.

7. Despite his verdict awarding damages, Petitioner has only been able to recover $10,000.00 from Mr. Belizaire. Mr. Belizaire's automobile liability insurance company paid Petitioner $10,000, which was the limit of his bodily injury liability insurance policy.

8. The Agency, through its Medicaid program, paid a total of $65,615.05 for Petitioner's medical care resulting from the 2007 automobile accident.[2/]

9. This administrative matter centers on the amount the Agency is entitled to be paid to satisfy its Medicaid lien following Petitioner's recovery of $10,000 from a third-party. Under section 409.910, the Agency may be repaid for its Medicaid expenditures from any recovery from liable third-parties. The Agency claims that, pursuant to the formula set forth in section 409.910(11)(f), it should collect $3,750 regardless of the full value of Petitioner's damages. (The Agency subtracted a statutorily recognized attorney fee of $2,500 from $10,000 leaving $7,500. One-half of $7,500 is $3,750.)

10. Petitioner asserts that pursuant to section 409.910(17)(b), the Agency should be reimbursed a lesser portion of Petitioner's recovery than the amount it calculated using the section 409.910(11)(f) formula. Petitioner specifically argues that the Agency's Medicaid lien must be reduced pro rata, taking into account the full value of Petitioner's personal injury claim

as determined by the Final Judgment entered in the underlying negligence lawsuit. Otherwise, application of the default statutory formula under section 409.910(11)(f) would permit the Agency to collect more than that portion of the settlement representing compensation for medical expenses. Petitioner maintains that such reimbursement violates the federal Medicaid law's anti-lien provision, 42 U.S.C. § 1396p(a)(1), and Florida common law. Petitioner contends that the Agency's allocation from Petitioner's recovery should be reduced to the amount of $230.00.

11. Based on the evidence in the record, Petitioner failed to prove, by clear and convincing evidence, that a lesser portion of Petitioner's total recovery should be allocated as reimbursement for medical expenses than the amount the Agency calculated pursuant to the formula set forth in section 409.910(11)(f). Accordingly, the Agency is entitled to recover $3,750.00 from Petitioner's recovery of $10,000 from a third-party to satisfy its Medicaid lien.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this case pursuant to sections 120.569, 120.57(1), and 409.910(17)(b), Florida Statutes.

13. The Agency is the Medicaid agency for the state, as provided under federal law, and administers Florida's Medicaid program. See § 409.901(2), Fla. Stat.

14. The federal 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 a state's participation is entirely optional, once a state elects to participate in the federal Medicaid program, it must comply with federal requirements governing the same. Id.; and 42 U.S.C. § 1396, et seq.

15. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses from Medicaid recipients who later recover from legally liable third parties. See Arkansas Dep't of Health & Hum. Servs. v. Ahlborn, 547 U.S. 268, 276 (2006). Consistent with this federal requirement, the Florida Legislature enacted section 409.910, Florida's "Medicaid Third-Party Liability Act," which authorizes and requires the Agency 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. See Smith v. Ag. for Health Care Admin., 24 So. 3d 590 (Fla. 5th DCA 2009). Section 409.910 creates an automatic lien on any such judgment or settlement with a third-party for the full amount of

medical assistance Medicaid provided to the Medicaid recipient. See § 409.910(6)(c), Fla. Stat.

16. Accordingly, by accepting Medicaid benefits, Medicaid recipients automatically subrogate their rights to third-party benefits for the full amount of medical assistance provided by Medicaid and automatically assigned to the Agency the right, title, and interest to those benefits, other than those excluded by federal law. See § 409.910(6)(a), (b), Fla. Stat.; see also 42 U.S.C. § 1396k(a)(1) (requiring states participating in the federal Medicaid program to provide, as a condition of Medicaid eligibility, assignment to the state the right to payment for medical care from any third-party); and Giraldo v. Ag. for Health Care Admin., No. 1D16-0392, 2016 Fla. App. LEXIS 18299 (1st DCA Dec. 12, 2016).[3/]

17. The obligation to reimburse the Agency (and Medicaid) following recovery from a third-party, however, is not unbounded. Pursuant to 42 U.S.C. §§ 1396a(a)(25)(A), (B), and (H); 1396k(a), and 1396p(a), the Agency may only assert a Medicaid lien against that portion of Petitioner's award from a third-party that represents the costs of the medical assistance made available for the individual. See Ahlborn, 547 U.S. at 278; Wos v. E.M.A., 133 S. Ct. 1391, 133 S. Ct. 1391, 1396 (2013); Harrell v. State, 143 So. 3d 478, 480 (Fla. 1st DCA 2014); and Davis v. Roberts, 130 So. 3d 164, 266 (Fla. 5th DCA 2013). The federal Medicaid

statute's anti-lien provision, 42 U.S.C. § 1396p(a)(1), prohibits a state from attaching a lien on a Medicaid recipient's property for the medical assistance paid by the state other than that portion of a Medicaid recipient's recovery designated as payment for medical care. See also section 409.910(4), (6)(b)1., and (11)(f), which provides that the Agency may not recover more than it paid for the Medicaid recipient's medical treatment.

18. As Ahlborn explains, the anti-lien provisions of the federal Medicaid Act circumscribe these obligations by authorizing payment to a state only from those portions of a Medicaid recipient's third-party settlement recovery allocated for payment of medical care. See also E.M.A. ex rel. Plyler v. Cansler, 674 F.3d 290, 312 (4th Cir. 2012), where the court concluded "[a]s the unanimous Ahlborn Court's decision makes clear, federal Medicaid law limits a state's recovery to settlement proceeds that are shown to be properly allocable to past medical expenses."

19. In cases where a Medicaid recipient only recovers a limited amount, section 409.910 protects the Medicaid recipient's interest in the non-medical expense portion of the judgment, award, or settlement. In this matter, the Agency, through the Medicaid program, paid a total of $65,615.05 for Petitioner's medical expenses. Petitioner's actual recovery for his injuries ($10,000), however, was less than the amount needed to fully

satisfy the Agency's Medicaid expenditures. Therefore, the Agency employed the formula established in section 409.910 to calculate the portion of his recovery that should be set aside to reimburse the medical assistance it provided to Petitioner.

20. Section 409.910(11)(f) sets forth the formula to determine the amount the Agency may recover for medical expenses from a judgment, award, or settlement from a third-party. Section 409.910(11)(f) states, in pertinent part:

> [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 as defined by the Florida Rules of Civil Procedure, 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 or his or her legal representative shall be calculated at 25 percent of the judgment, award, or settlement.
>
> 4. Notwithstanding any provision of this section to the contrary, the agency shall be entitled to all medical coverage benefits up to the total amount of medical assistance provided by Medicaid. For purposes of this paragraph, "medical coverage" means any benefits under health insurance, a health

> maintenance organization, a preferred provider arrangement, or a prepaid health clinic, and the portion of benefits designated for medical payments under coverage for workers' compensation, personal injury protection, and casualty.

21. The section 409.910(11)(f) formula establishes that the Agency's recovery for a Medicaid lien is limited to the lesser of: (1) its full lien; or (2) one-half of the total award, 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. See Ag. for Health Care Admin. v. Riley, 119 So. 3d 514, 515 n.3 (Fla. 2d DCA 2013).

22. The parties stipulate that, using the section 409.910(11)(f) formula, $3,750 of Petitioner's $10,000 total recovery is the amount due to the Agency to satisfy its Medicaid lien.

23. However, section 409.910(17)(b) provides a method by which a Medicaid recipient may contest the amount designated as recovered medical expenses payable under section 409.910(11)(f). Following the U.S. Supreme Court decision in Wos, the Florida Legislature created an administrative process to determine the portion of the judgment, award, or settlement in a tort action representing medical expenses, and thus the portion the Agency's Medicaid lien that must be reimbursed. Section 409.910(17)(b) states:

> 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 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. (Emphasis added).

24. Section 409.910(17)(b) establishes that the section 409.910(11)(f) formula constitutes a default allocation of the amount of a settlement that is attributable to medical costs, and sets forth an administrative procedure for an adversarial challenge of that allocation. See Harrell, 143 So. 3d at 480 ("we now hold that a plaintiff must be given the opportunity to seek reduction of the amount of a Medicaid lien established by the

statutory formula outlined in section 409.910(11)(f), by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses").

25. In order to successfully challenge the amount payable to the Agency, the burden is on the Medicaid recipient to 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 the Agency calculated. § 409.910(17)(b), Fla. Stat.

26. 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). Clear and convincing evidence requires:

> [T]hat the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994); Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

27. Accordingly, if Petitioner can prove, by clear and convincing evidence, that the past and future medical expense portion of his award is less than the amount the Agency calculated

using the section 409.910(11)(f) formula, Petitioner may reduce the amount it must reimburse the Agency below $3,750.

28. Petitioner proposes that the Agency should be allocated only 2.3 percent of Petitioner's total recovery ($230) as reimbursement for its payment of Petitioner's medical expenses. Petitioner calculates this amount as follows: the Final Judgment in Petitioner's negligence case established that Petitioner suffered a total of $2,859,120.56 in damages. Of this amount, the jury allocated $128,760.56 for past medical expenses and $1,301,268.00 for future medical expenses. Medicaid paid $65,615.05 of Petitioner's medical expenses. Thus, the medical assistance Medicaid expended on Petitioner's behalf equals approximately 2.3 percent of Petitioner's total claim ($65,615.05 divided by $2,859,120.56). Applying this percentage to Petitioner's total recovery of $10,000, as a matter of fairness, the Agency should only recover $230 ($10,000 times 2.3 percent).

29. However, while Petitioner did prove that a lesser portion of Petitioner's total recovery of $10,000 should be allocated to reimburse the Agency, Petitioner did not meet his burden of demonstrating, by clear and convincing evidence, that that amount should be less than the $3,750 the Agency calculated under section 409.910(11)(f), or should be reduced to $230. Primarily, no evidence in the record sets out how Petitioner's $10,000 recovery should be divided between medical and non-medical

expenses (if it can be at all). As a result, the alternative calculation Petitioner proposes fails to take into account or designate some limited portion of Petitioner's award that represents past or future medical expenses. Consequently, no evidence demonstrates that the $10,000 recovery does not include at least $3,750 that could be attributed to Petitioner's medical costs. Neither does the evidence indicate that the $3,750 amount includes payments for expenses other than Petitioner's medical care and services. Therefore, because Petitioner bears the burden of proving, clearly and convincingly, that his formula properly allocates a lesser amount to be reimbursed to satisfy the Agency's Medicaid lien, Petitioner failed to present the evidence necessary to avoid the application of the statutory formula contained in section 409.910(11)(f).[4/]

30. Accordingly, while Petitioner's calculation may offer a more equitable portion of Petitioner's $10,000 recovery to be allotted to the Agency in light of the large amount of damages Petitioner suffered, the undersigned is mindful that "Medicaid is a cooperative federal-state welfare program providing medical assistance to needy people." Roberts v. Albertson's Inc., 119 So. 3d 457, 458 (Fla. 4th DCA 2012) (quoting Ag. for Health Care Admin. v. Estabrook, 711 So. 2d 161, 163 (Fla. 4th DCA 1998)); see also 42 U.S.C. § 1396a(a)(25)(A)-(B). Although state participation in this federal program is voluntary, once a state

elects to participate, it must comply with federal Medicaid law. Roberts, 119 So. 3d at 458; see also Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502 (1990). Further, as expressed in Giraldo:

> To keep the Medicaid program viable, Congress recognized that it is necessary to obtain reimbursement when a third party makes payment to the Medicaid beneficiary for medical care already paid for by Medicaid. Roberts, 119 So. 3d at 459. As Roberts explains, the goal of the reimbursement provision of the Medicaid Act was at least in part to protect tax dollars. 119 So. 3d at 459 (citing Tristani v. Richman, 652 F.3d 360, 373 (3d Cir. 2011)). This, no doubt, is at least in part so that other "needy people" may secure the care they so desperately require.

Giraldo, supra., at 18.

31. In sum, Petitioner failed to prove, by clear and convincing evidence, that a lesser portion of Petitioner's total recovery should be allocated as reimbursement for past medical expenses than the amount the Agency calculated using the section 409.901(11)(f) formula. Based on the facts in the record, the Agency is entitled to $3,750.00 for its Medicaid expenditures from Petitioner's third-party recovery.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED that the Agency for Health Care Administration is entitled to $3,750.00 from the third-party settlement at issue in this matter in satisfaction of its Medicaid lien.

DONE AND ORDERED this 29th day of December, 2016, in Tallahassee, Leon County, Florida.

J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of December, 2016.

ENDNOTES

[1/] All references to the Florida Statutes are to the 2016 version, unless otherwise noted.

[2/] Following Petitioner's discharge from Brooks, he moved to Valdosta, Georgia. Georgia Medicaid paid a total of $13,507.56 for Petitioner's continued medical care resulting from the accident. No evidence of a lien initiated by Georgia Medicaid (if any) was presented at the final hearing.

[3/] Giraldo was issued on December 12, 2016, and is not final until time expires to file motion for rehearing and disposition thereof if filed.

[4/] In determining the portion of a Medicaid recipient's recovery available to reimburse the Agency, funds attributed to both past and future medical costs should be included in the calculation. See Giraldo, supra., at 8-9, 17, which holds that the Agency has the right to reimbursement from settlement proceeds attributed to both past medical expenses, as well as that portion of a settlement designated as future medical expenses. Giraldo explains:

> [W]e find no error in the ALJ's legal determination relating to AHCA's right to secure reimbursement for payments already made for medical costs from not only that portion of the settlement allocated for past medical expenses but also from that portion of the settlement intended as compensation for future medical expenses. We do so initially because that is precisely what Florida law required the ALJ to do. . . . Specifically, the [§ 409.910(11)(f)] formula allocates one half of the gross (or entire settlement) recovered (which would include the recipient's recovery for past and future medical costs) less only attorney's fees and costs as designated to repay the state's Medicaid agency for the medical expenses that it has paid.
>
> Likewise, section 409.910(17)(b), which authorizes a Medicaid recipient to challenge the amount allocated under section 409.910(11)(f), expressly requires consideration of the amounts the Medicaid recipient has "recovered" to reimburse him or her "for past and future medical expenses."
>
> * * *
>
> [W]e choose . . . to align ourselves with what we believe are the better reasoned decisions of those courts which have held that a state agency may secure payment from both past and future recoveries for medical expenses.

COPIES FURNISHED:

John Cofield
Xerox Recovery Services
2073 Summit Lake Drive, Suite 300
Tallahassee, Florida 32317

Alexander R. Boler, Esquire
Xerox Recovery Services
Suite 300
2073 Summit Lake Drive
Tallahassee, Florida 32317
(eServed)

Brent G. Steinberg, Esquire
Swope, Rodante P.A.
1234 East 5th Avenue
Tampa, Florida 33605
(eServed)

Brandon G. Cathey, Esquire
Swope, Rodante P.A.
1234 East 5th Avenue
Tampa, Florida 33605
(eServed)

Richard J. Shoop, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Stuart Williams, General Counsel
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Justin Senior, Interim Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)

Shena L. Grantham, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Thomas M. Hoeler, Chief Facilities Counsel
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

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.