

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HAYDEE ARANDA, D.D.S.,

Petitioner,

vs.

Case No. 16-6924F

DEPARTMENT OF HEALTH, BOARD OF
DENTISTRY,

Respondent.

_____ /

FINAL ORDER

On February 22, 2017, the final hearing in this case was held in Tallahassee before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Sean Michael Ellsworth, Esquire
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For Respondent: Candace A. Rochester, Esquire
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STATEMENT OF THE ISSUES

The issues are whether attorney's fees and costs should be awarded to the Petitioner (Petitioner or Dr. Aranda) under section 57.105, Florida Statutes (2016),^{1/} and, if so, the amount of the fees and costs.

PRELIMINARY STATEMENT

The petition for attorney's fees and costs in this case was filed on November 21, 2016. On January 26, 2017, the petition was amended to delete a claim under section 57.111, leaving a claim under section 57.105. A Joint Pre-hearing Stipulation was filed on February 13.

At the final hearing, counsel for the Petitioner and an expert witness, Edwin Bayo, Esquire, testified for the Petitioner and her Exhibits 1 through 7 were received in evidence. Irene Lake and expert witness, Daniel Russell, Esquire, testified for the Department of Health, Board of Dentistry (Respondent or DOH), and Respondent's Exhibits 1 through 4 were received in evidence. The Transcript of the final hearing was filed, and the parties filed proposed final orders that have been considered.

FINDINGS OF FACT

1. In 2010, DOH received a sworn complaint from the Collier County Health Department (CCHD) alleging essentially: that Dr. Aranda was misrepresenting the nature of dental work she was providing to Medicaid patients to make it appear that she was prescribing and delivering non-orthodontic, "passive" appliances, which was covered by Medicaid, when she actually was prescribing and delivering orthodontic, "active" appliances, which was not covered by Medicaid, after being warned by her supervisor not to do so; and that she was delegating irremediable tasks, such as

permanently cementing dental appliances and hand-scaling, to unqualified dental assistants. DOH investigated, and a panel of the Board of Dentistry found probable cause based on the investigative report.

2. In May 2015, DOH filed an Amended Administrative Complaint charging Dr. Aranda as follows: in Count I, with making deceptive, untrue, or fraudulent representations in or related to the practice of dentistry in violation of section 466.028(1)(1), Florida Statutes (2009)^{2/}; and, in Count II, with delegating irremediable tasks (hand-scaling and permanently cementing dental appliances) to a dental assistant not qualified to perform those tasks, in violation of sections 466.028(1)(z) and 466.024(1), and Florida Administrative Code Chapter 64B5-16.^{3/} Dr. Aranda disputed the allegations and asked for a disputed-fact hearing under section 120.57(1), Florida Statutes (2015)^{4/}. The case was referred to DOAH, designated case 15-6268PL, and scheduled for a final hearing on March 2, 2016.

3. On February 11, 2016, Dr. Aranda served (but did not file) a motion for sanctions pursuant to section 57.105, Florida Statutes (2015). The motion asserted that DOH knew or should have known that several paragraphs in the Amended Administrative Complaint referred to the billing of Medicaid for "passive" space maintainers and other similar appliances and related dental

services, and that those allegations were not supported by the material facts necessary to establish them.

4. The motion for sanctions served by Dr. Aranda in DOAH case 15-6268PL was based on discovery she had obtained through a deposition of the CCHD's records custodian. The deposition revealed that the documents DOH had been calling Medicaid billing records actually were "dental treatment plans." There were other documents called "bill service lists" that were the actual bills sent to Medicaid for payment. The "bill service lists" reflected flat fee bills to Medicaid for "Medicaid billing encounters." The "dental treatment plans" consisted of patient demographics, personal information, insurance and billing information, and services provided. The "dental treatment plans" contained references to space maintainers and similar non-orthodontic appliances that were covered by Medicaid, and there were references to events labeled "bill initiated." Both the "bill service lists" and the "dental treatment plans" were generated by the CCHD's so-called HMS computer system.

5. The motion for sanctions served by Dr. Aranda in DOAH case 15-6268PL concluded with a warning that it would be filed if DOH did not withdraw the allegations in the Amended Administrative Complaint referring to the billing of Medicaid for "passive" space maintainers and other similar appliances and related dental services. DOH did not withdraw the allegations.

6. At the final hearing in DOAH case 15-6268PL, there was considerable confusion about the billing process and the various documents. Eventually, the "dental treatment plans" were received in evidence with the understanding that they were not the actual bills sent to Medicaid for payment. The "bill service lists" were not moved in evidence by either party.

7. The billing information in the HMS system was entered by the CCHD's clerical staff from "super bills" that were created by dental practitioners, including Dr. Aranda, based on their care and treatment of patients. Besides submitting her "super bills," Dr. Aranda played no part in the generation of HMS billing information or the actual billing of Medicaid by the CCHD.

8. The "super bills" were not available to be used in the final hearing because they were discarded shortly after the entry of the information they contained into the HMS system. No member of the CCHD's clerical staff testified, and there was no evidence about the Respondent's actual entries on her super bills.^{5/} Meanwhile, some of the patient records and appliance prescriptions written by Dr. Aranda for her Medicaid patients accurately reflected the kinds of orthodontic-type "active" appliances she was using for her Medicaid patients. Dr. Aranda testified that she was openly using orthodontic-type appliances for non-orthodontic purposes for these Medicaid patients.

9. The Recommended Order in DOAH case 15-6268PL was entered on May 24, 2016. It found that DOH did not prove, by clear and convincing evidence, the charge in the Amended Administrative Complaint that Dr. Aranda was making deceptive, untrue, or fraudulent representations in or related to the practice of dentistry in violation of section 466.028(1)(1), Florida Statutes (2009). It recommended dismissal of the charges. The Final Order was entered on September 23, 2016; it adopted the Recommended Order, despite exceptions filed by DOH.

10. On November 21, 2016, the Petitioner filed a petition for attorney's fees and costs under both section 57.111 and section 57.105. The petition was designated DOAH case 16-6924F. It was amended to drop the claim under section 57.111.

11. It was clear, and DOH knew or should have known within 21 days of service of Dr. Aranda's section 57.105 motion for sanctions in case 15-6268PL, that the HMS "dental treatment plans" were not the actual bills sent to Medicaid for payment. The HMS "bill service lists" were the actual bills sent to Medicaid. However, the services billed to Medicaid via the HMS "bill service lists" were the same services described in the HMS "dental treatment plans" (even if the "bill service lists" themselves did not specify the services). Dr. Aranda did not prove by a preponderance of the evidence that DOH knew or should have known that the charge in the Amended Administrative

Complaint, that Dr. Aranda was making deceptive, untrue, or fraudulent representations in or related to the practice of dentistry in violation of section 466.028(1)(1), Florida Statutes (2009), was not supported by the material facts necessary to establish it.

CONCLUSIONS OF LAW

12. Under section 57.105(5), Florida Statutes, an administrative law judge shall award a reasonable attorney's fee and damages to the prevailing party on the same basis as provided in subsections (1) and (4). Subsection (1)(a) provides for an award to the prevailing party on any claim or defense at any time during a proceeding or action in which the losing party or its attorney knew or should have known that a claim or defense when initially presented, or at any time before the final hearing, was not supported by the material facts necessary to establish the claim or defense.

13. The Petitioner bases her section 57.105 petition for sanctions on the allegations in DOH's Amended Administrative Complaint referring to the billing of Medicaid for "passive" space maintainers and other similar appliances and related dental services. Those allegations did not constitute the "claim" in DOH's Amended Administrative Complaint. DOH's claim was that Dr. Aranda made deceptive, untrue, or fraudulent representations in or related to the practice of dentistry in violation of

section 466.028(1)(1), Florida Statutes (2009), by misrepresenting the nature of dental work she was providing to Medicaid patients to make it appear that she was prescribing and delivering non-orthodontic, passive appliances, which was covered by Medicaid, when she actually was prescribing and delivering orthodontic, active appliances, which was not covered by Medicaid, after being warned by her supervisor not to do so. Dr. Aranda did not prove that DOH knew or should have known that its claim was not supported by the material facts necessary to establish it.

14. Subsection (4) provides a "safe harbor" for a party who withdraws an unsupported claim or defense within 21 of service of a motion for sanctions under section 57.105. The 21-day safe harbor is strictly enforced. See Dunkin' Donuts Franchised Rests., LLC v. 330545 Donuts, Inc., 27 So. 3d 711, 713-14 (Fla. 4th DCA 2010); Montgomery v. Larmoyeux, 14 So. 3d 1067, 1072 (Fla. 4th DCA 2009); Anchor Towing, Inc. v. Fla. Dep't of Transp., 10 So. 3d 670, 672 (Fla. 3d DCA 2009). Dr. Aranda cannot now change the focus of her section 57.105 motion for sanctions from the allegations in DOH's Amended Administrative Complaint referring to the billing of Medicaid for "passive" space maintainers and other similar appliances and related dental services, to the Amended Administrative Complaint's actual claim against her.

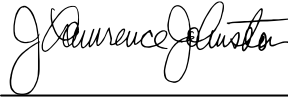
15. Even if the motion for sanctions served by Dr. Aranda on February 11, 2016, addressed the actual claim in the Amended Administrative Complaint, Dr. Aranda did not prove that DOH knew or should have known that the actual claim was not supported by the material facts necessary to establish it. The actual claim did not require proof that Medicaid was sent bills that specified "passive" space maintainers and other similar non-orthodontic appliances and services.

16. Even if the actual claim was that Medicaid was sent fraudulent bills for "passive" space maintainers and other similar non-orthodontic appliances and services, Dr. Aranda did not prove that DOH knew or should have known that such a claim would not have been supported by the material facts necessary to establish it. The "encounters" billed via the "bill service lists" were for the services identified in the "dental treatment plans," which included references to space maintainers and similar non-orthodontic appliances that were covered by Medicaid.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, the petition for attorney's fees and costs under section 57.105 is dismissed.

DONE AND ORDERED this 2nd day of May, 2017, in Tallahassee,
Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of May, 2017.

ENDNOTES

- ^{1/} At the time of the filing of the petition, the 2016 codification of the Florida Statutes was in effect.
- ^{2/} The statutes alleged to have been violated were in the 2009 Florida Statutes.
- ^{3/} The rules alleged to have been violated were those in effect at the times of the alleged violations in 2009 and 2010.
- ^{4/} The 2015 version of the Administrative Procedure Act was in effect at the time of the request for a hearing.
- ^{5/} See Recommended Order, DOAH case 15-6268PL, ¶¶ 17-19.

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.