STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

HCR MANOR CARE SERVICES OF FLORIDA, LLC d/b/a HEARTLAND HOME HEALTH CARE,

Respondent.
_____/

DOAH CASE NO. 18-1848MPI
MPI CASE ID. 2016-0006546
RENDITION NO.: AHCA-19-0351 -FOF-MDO

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), Yolanda Y. Green, issued a Recommended Order after conducting a formal hearing. At issue in this proceeding is whether the Agency for Health Care Administration ("Agency") is entitled to recover alleged Medicaid overpayments it made to Respondent for hospice services Respondent provided during the audit period between July 1, 2011, and December 31, 2014, and whether the Agency should impose costs and a fine on Respondent. The Recommended Order dated March 7, 2019, is attached to this Final Order and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

Both Petitioner and Respondent[1] filed exceptions to the Recommended Order.

[1] Counsel for Respondent filed exceptions with DOAH. However, both Rule 28-106.217, F.A.C., and the Recommended Order itself direct the parties to file exceptions with the Agency. Nevertheless, the Agency will address the merits of them.

In determining how to rule upon the parties' exceptions and whether to adopt the ALJ's Recommended Order in whole or in part, the Agency must follow section 120.57(1)(l), Florida Statutes, which provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. . . .

§ 120.57(1)(l), Fla. Stat. Additionally, "[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat. In accordance with these legal standards, the Agency makes the following rulings on the parties' exceptions:

Petitioner's Exceptions

In its sole exception to the Recommended Order, Petitioner takes exception to Paragraph 121 of the Recommended Order, and the portion of the Recommendation section of the Recommended Order, wherein the ALJ reserves jurisdiction to award costs, arguing the ALJ does not have the authority to do so. The Agency agrees with Petitioner that the ALJ cannot

retain jurisdiction over this matter in order to determine the amount of costs due to Petitioner. Instead, costs are more appropriately determined in a separate proceeding, as was stated by the ALJ in Agency for Health Care Administration v. Brown Pharmacy, DOAH Case No. 05-3366MPI (Recommended Order November 3, 2006). The ALJ departed from the essential requirements of law by concluding otherwise in Paragraph 121 of the Recommended Order. The Agency finds that it can substitute conclusions of law that are as or more reasonable than those of the ALJ in Paragraph 121. Therefore, the Agency grants Petitioner's exception, and modifies the conclusions of law in Paragraph 121 of the Recommended Order as follows:

> 121. AHCA reserved its right to amend its cost worksheet in this matter and, pursuant to section 409.913(23), to file a request with the undersigned to seek all investigative and legal costs, if it prevailed. Because it has prevailed regarding two of the three claims, ~~this tribunal reserves jurisdiction to enter an Order on costs~~it is entitled to the costs related to those two claims. ~~AHCA is ordered, within 30 days of the date of this Order, to serve Heartland and provide the undersigned with its evidence of the investigative, legal, and expert witness costs it incurred in this proceeding. If Heartland disputes this evidence, it shall have 10 days thereafter to file a pleading to contest AHCA's claim.~~ However, there is no authority in section 409.913(23), Florida Statutes, for the undersigned to retain jurisdiction on the issue of AHCA's costs. See Agency for Health Care Administration v. Brown Pharmacy, DOAH Case No. 05-3366MPI (Recommended Order November 3, 2006). Rather, AHCA, once it has ultimately prevailed in this case through the entry of a final order, may then determine the amount of its costs and assess them against Respondent. Should Respondent dispute AHCA's determination and raise disputed issues of material fact, the matter may then be referred by AHCA to the Division of Administrative Hearings.

The Agency also declines to adopt the ALJ's Recommendation as it relates to the issue of costs, and instead notifies the parties of the appropriate procedure for the determination of the costs that should be assessed in this matter in the "Ordered and Adjudged" section of this Final Order.

Respondent's Exceptions

In Section I. A. – C. and H, and Section II. C. and E. of its exceptions, Respondent takes exception to Paragraphs 40-41, 45-46, 59-87 and 111 of the Recommended Order, arguing the ALJ: 1) failed "to properly apply federal and Florida law when she inappropriately took into account hindsight testimony from both peer reviewers in reaching her factual conclusions and recommendation"; 2) misapplied "the legal principle that two physicians reviewing the same patient may disagree about hospice eligibility but that does not demonstrate an incorrect certification"; 3) incorrectly adopted Dr. Saad's opinions; and 4) incorrectly considered Dr. Saad and Dr. Weston to be qualified peer reviewers under section 409.9131, Florida Statutes. The Agency disagrees with all of Respondent's arguments for the following reasons:

- In regard to the findings of fact in Paragraphs 40-41 and 45-46, these findings of fact involve the credibility and weight the ALJ gave to Dr. Saad and Dr. Weston's testimony. The Agency is not permitted to second-guess the ALJ on that issue. See Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) ("The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion."); Stinson v. Winn; 938 So. 2d 554 (Fla. 1st DCA 2006) ("Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence."). Also, to the extent Paragraphs 40-41 and 45-46 of the Recommended Order could be construed to be conclusions of law regarding Dr. Saad and Dr. Weston's qualifications as "peers" under section 409.9131(2), Florida Statutes, the ALJ correctly found these two doctors were "peers" under the statute. See Murciano

v. Agency for Health Care Administration, 208 So. 3d 130 (Fla. 3d DCA 2016). Thus, the ALJ's conclusions of law are reasonable. Therefore, for all these reasons, the Agency denies Respondent's exceptions to Paragraphs 40-41 and 45-46 of the Recommended Order.

- In regard to Paragraphs 59-87 of the Recommended Order, the findings of fact in these paragraphs are all based on competent, substantial record evidence. See Transcript, Pages 127-135 and 210-214; Joint Exhibits 12, 13, 16 and 20. Thus, the Agency is prohibited from rejecting or modifying them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Furthermore, Respondent's argument that Dr. Saad and Dr. Weston's testimony demonstrated they used hindsight is not supported by the record. Indeed, both doctors stated they used the relevant sections of the Florida Medicaid Hospice Services Coverage and Limitations Handbook when reviewing the recipients' medical records in order to determine whether the recipients at issue were eligible for hospice services under Medicaid. See Transcript, Pages 110-113 and 207-209. In addition, the ALJ did not misapply "the legal principle that two physicians reviewing the same patient may disagree about hospice eligibility but that does not demonstrate an incorrect certification," as Respondent argues. Dr. Saad and Dr. Weston's testimony clearly indicates they did not believe Respondent correctly determined P.C. and S.L. were eligible for hospice services under Medicaid. See Transcript, Pages 156-158 and 233-234. Lastly, Respondent's argument that Dr. Saad applied incorrect standards to determine hospice eligibility under Medicaid is not valid. The record shows Dr. Saad correctly applied the relevant sections of the Florida

Medicaid Hospice Services Coverage and Limitations Handbook to determine whether the recipients at issue were eligible for hospice services under Medicaid. See Transcript, Pages 110-113. Therefore, for all these reasons, the Agency denies Respondent's exception to Paragraphs 59-87 of the Recommended Order.

- In regard to Paragraph 111 of the Recommended Order, the paragraph is merely a verbatim quote of section 409.9131(2), Florida Statutes, and contains no findings of fact or conclusions of law. Therefore, the Agency denies Respondent's exception to Paragraph 111 of the Recommended Order.

In Sections I. D., II. B. and II. F. of its exceptions, Respondent takes exception to Paragraph 121 of the Recommended Order, arguing that costs should not be imposed in this case since it involves a federal audit, and section 409.913(23), Florida Statutes, does not apply to it. Thus, the Agency is not entitled to all of its costs in this case. In spite of the modifications the Agency made to Paragraph 121 of the Recommended Order in the ruling on Petitioner's exception supra, the Agency disagrees with Respondent's argument that the audit at issue is a federal audit, and thus the costs provision of section 409.913, Florida Statutes, does not apply. Section 409.913(23)(a), Florida Statutes, authorizes the Agency to "recover all investigative, legal, and expert witness costs" for "an audit or an investigation of a violation committed by a provider which is conducted pursuant to this section [409.913]." (Emphasis added). Regardless of the role the federal government played in the audit at issue in this matter, it is clear from the record that the audit was conducted pursuant to section 409.913, Florida Statutes. See Transcript, Pages 28-29, 34-35, 38, and 39-40; Joint Exhibit 6. Furthermore, Respondent agreed that Chapter 409, Part III, Florida Statutes, applies to this matter. See Joint Prehearing

Stipulation at Page 10. Therefore, the Agency denies Respondent's exception to Paragraph 121 of the Recommended Order.

In Sections I. E. and II. A. of its exceptions, Respondent takes exception to Paragraphs 103-105 and 117-121 of the Recommended Order, arguing the ALJ failed to demonstrate how Petitioner met the clear and convincing evidence standard for imposing a fine on Respondent. Paragraph 103 of the Recommended Order merely explains how the fine is calculated, and has nothing to do with the burden of proof. Paragraph 104 of the Recommended Order establishes DOAH's jurisdiction over this matter, and has nothing to do with the burden of proof in the case. In regard to Paragraph 105 of the Recommended Order, the ALJ laid out the correct burden of proof for both the fine and the overpayment. Thus, the Agency cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency denies Respondent's tenth exception as it pertains to Paragraph 105 of the Recommended Order. In regard to Paragraphs 117-121 of the Recommended Order, it is obvious that the ALJ applied the correct burden of proof in reaching her conclusions of law concerning the imposition of a fine on Respondent. The Agency cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency denies Respondent's exception as it pertains to Paragraphs 117-121 of the Recommended Order.

In Section I. F. of its exceptions, Respondent takes exception to the Recommended Order in general, arguing the ALJ ignored or failed to consider several of the legal positions and findings of fact contained in Respondent's proposed recommended order. The Agency does not need to rule on this exception because Respondent fails to clearly identify the disputed portion of the Recommended Order that it is taking exception to by page number or paragraph. See § 120.57(1)(k), Fla. Stat. Furthermore, Respondent's argument has no merit because the 1996

amendments to chapter 120, Florida Statutes, absolved ALJs of having to rule on every finding of fact and conclusion of law in a party's proposed recommended order. See Life Care Centers of America, Inc. v. Sawgrass Care Center, Inc., 683 So. 2d 609 (Fla. 1st DCA 1996).

In Sections I. G. and II. D. of its exceptions, Respondent takes exception to the ALJ's denial of its October 2, 2018 Partial Motion to Dismiss, arguing it should have been granted. The Agency does not need to rule on this exception either because Respondent fails to clearly identify the disputed portion of the Recommended Order that it is taking exception to by page number or paragraph. See § 120.57(1)(k), Fla. Stat. In addition, the arguments Respondent raised in the Partial Motion to Dismiss concern a statute of limitations issue that is outside of the Agency's substantive jurisdiction. See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So.2d 1140, 1142 (Fla. 2d DCA 2001) (stating an agency does not have substantive jurisdiction to decide whether the doctrine of collateral estoppel applies to a particular case).

FINDINGS OF FACT

The Agency adopts the findings of fact set forth in the Recommended Order.

CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Recommended Order, except where noted supra.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

Respondent owes the Agency $58,468.22 in overpayments for services provided to Medicaid recipients. The Agency also hereby imposes an $11,693.64 fine on Respondent pursuant to rule 59G-9.070(7)(e), Florida Administrative Code. Since Respondent has already repaid the Agency $127,015.43, which was the total amount listed in the Final Audit Report, Respondent is entitled to a refund of $56,853.57 ($127,015.43 - $58,468.22 - $11,693.64 =

$56,853.57). The Agency shall refund this amount to Respondent within 30 days of the date of rendition of the Final Order unless other payment arrangements have been made by the parties.

In addition, since the Agency has prevailed in this matter, it is entitled to recover the investigative, legal and expert witness costs it incurred in this matter. § 409.913(23), F.S. The parties shall attempt to agree to amount of investigative, legal, and expert witness costs for this matter. If the parties are unable to reach such agreement, either party may file a request for hearing with the Division of Administrative Hearings under this case style within 30 days of the date of rendition of this Final Order, and the Administrative Law Judge who presided over this matter shall determine the amount of such costs.

DONE and ORDERED this 18 day of April, 2019 in Tallahassee, Florida.

Mary C. Mayhew

MARY C. MAYHEW, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY ALONG WITH THE FILING FEE PRESCRIBED BY LAW WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished to the persons named below by the method designated on this 19 day of April, 2019.

Amy Mir for
RICHARD J. SHOOP, Agency Clerk
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