STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DONNA L. FALLON, AS POWER OF ATTORNEY FOR ALICIA M. FALLON,

Petitioner,

vs. Case No. 19-1923MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy by video teleconference, with locations in Lauderdale Lakes and Tallahassee, Florida, on June 24, 2019.

APPEARANCES

For Petitioner: Jason Dean Lazarus, Esquire
Special Needs Law Firm
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Orlando, Florida 32814

For Respondent: Alexander R. Boler, Esquire
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STATEMENT OF THE ISSUE

The issue to be decided is the amount to be paid by Petitioner to Respondent, Agency for Health Care Administration ("AHCA"), out of her settlement proceeds, as reimbursement for

past Medicaid expenditures pursuant to section 409.910, Florida Statutes.

PRELIMINARY STATEMENT

On April 15, 2019, Petitioner filed a Petition to Determine Medicaid's Lien Amount to Satisfy Claim against Personal Injury Recovery by the Agency for Health Care Administration pursuant to section 409.910(17)(b), Florida Statutes. The matter was assigned to the undersigned administrative law judge to conduct a formal administrative hearing and enter a final order.

Prior to the final hearing, the parties filed a Joint Prehearing Stipulation, which included numerous stipulated and admitted issues of law and fact. Those stipulated issues of law and fact have been incorporated herein.

The final hearing proceeded as scheduled on June 24, 2019. Petitioner, Donna L. Fallon, as mother and Power of Attorney for Alicia M. Fallon, testified and also presented the testimony of two expert witnesses, attorneys Sean Domnick, Esquire, and James Nosich, Esquire. Petitioner's Exhibits 1 through 9 were admitted into evidence. AHCA did not call any witnesses or offer any exhibits.

The parties elected not to order a transcript of the final hearing. The parties timely filed their respective proposed final orders, which were considered by the undersigned in the

preparation of this Final Order. All references to the Florida Statutes are to the 2017 version unless otherwise stated.

FINDINGS OF FACT

1. On or about September 17, 2007, Alicia M. Fallon ("Alicia"), then 17 years old, drove to the mall to meet friends and became involved in an impromptu street race. Alicia lost control of the vehicle she was driving, crossed the median into oncoming traffic, and was involved in a motor vehicle crash. Her injuries consisted of traumatic brain injury ("TBI") with moderate hydrocephalus, right subdural hemorrhage, left pubic ramus fracture, pulmonary contusions (bilateral), and a clavicle fracture. Since the time of her accident, she has undergone various surgical procedures including the insertion of a gastrostomy tube, bilateral frontoparietal craniotomies, insertion of a ventriculoperitoneal shunt, and bifrontal cranioplasties.

2. As a result of the accident, in addition to the physical injuries described above, Alicia suffered major depressive disorder, and Post-Traumatic Stress Disorder injuries. She is confined to a wheelchair for mobility, has no bowel or bladder control, and suffers from cognitive dysfunction. Alicia is totally dependent on others for activities of daily living and must be supervised 24 hours a day, every day of the week.

3. A lawsuit was brought against the driver of the other car in the race, as well as the driver's mother, the owner of the vehicle. It could not be established that the tortfeasor driver hit Alicia's car in the race, or that he cut her off. The theory of liability was only that because Alicia and the other driver in the race were racing together, that the tortfeasor was at least partially responsible for what happened. It was viewed that there was no liability on the part of the driver of the third vehicle. The tortfeasor only had $100,000 in insurance policy limits, but the insurance company did not timely offer payment. The tortfeasor had no pursuable assets.

4. The lawsuit was bifurcated and the issue of liability alone was tried. The jury determined that the tortfeasor driver was 40 percent liable for Alicia's damages. Because of the risk of a bad faith judgment, the insurance company for the tortfeasor settled for the gross sum of $2.5 million.

5. AHCA, through its Medicaid program, provided medical assistance to Ms. Fallon in the amount of $608,795.49. AHCA was properly notified of the lawsuit against the tortfeasors, and after settlement, asserted a lien for the full amount it paid, $608,795.49, against the settlement proceeds. AHCA did not "institute, intervene in, or join in" the medical malpractice action to enforce its rights as provided in section 409.910(11), or participate in any aspect of Alicia's claim against the

tortfeasors or their insurance company. Application of the formula at section 409.910(11)(f), to the settlement amount requires payment to AHCA in the amount of $608,795.49.

6. Another provider, Optum, provided $592,554.18 in past medical expense benefits on behalf of Ms. Fallon. However, that amount was reduced through negotiation to a lien in the amount of $22,220.78.[1/]

7. Petitioner deposited the full Medicaid lien amount in an interest bearing account for the benefit of AHCA pending an administrative determination of AHCA's rights, and this constitutes "final agency action" for purposes of chapter 120, Florida Statutes, pursuant to section 409.910(17).

8. Petitioner, Donna Fallon, the mother of Alicia, testified regarding the care that was and is continuing to be provided to Alicia after the accident. She is a single parent, and with only the assistance of an aide during the day, she is responsible for Alicia's care. Alicia must be fed, changed, bathed, and turned every few hours to avoid bed sores. Alicia can communicate minimally by using an electronic device and by making noises that are usually only discernable by her mother. Although she needs ongoing physical therapy and rehabilitation services, the family cannot afford this level of care.

9. Petitioner presented the testimony of Sean Domnick, Esquire, a Florida attorney with 30 years' experience in

personal injury law, including catastrophic injury and death cases, medical malpractice, and brain injury cases. Mr. Domnick is board certified in Civil Trial by the Florida Bar. He represented Alicia and her mother in the litigation against the tortfeasors and their insurance company. As a routine part of his practice, he makes assessments concerning the value of damages suffered by injured clients. He was accepted, without objection, as an expert in valuation of damages.

10. Mr. Domnick testified that Alicia's injuries are as catastrophic as he has handled. Alicia has no strength, suffers contractions and spasms, and is in constant pain. Alicia has impaired speech, limited gross and fine motor skills, is unable to transfer, walk, or use a wheelchair independently. Alicia is unable to self-feed. All of her food must be cooked and cut up for her. Alicia is unable to perform self-hygiene and has no ability to help herself in an emergency and therefore requires constant monitoring.

11. As part of his work-up of the case, Mr. Domnick had a life care plan prepared by Mary Salerno, a rehabilitation expert, which exceeded $15 million on the low side, and $18 million on the high side, in future medical expenses alone for Alicia's care. Mr. Domnick testified that the conservative full value of Alicia's damages was $45 million. That figure included $30 million for Alicia's pain and suffering, mental

anguish and loss of quality of life, disability, and disfigurement, extrapolated for her life expectancy, plus the low end of economic damages of $15 million.

12. Petitioner also presented the testimony of James Nosich, Esquire, a lawyer who has practiced primarily personal injury defense for 29 years. Mr. Nosich and his firm specialize in defending serious and catastrophic personal injury/medical malpractice cases throughout Florida. As part of his practice, Mr. Nosich has reviewed more than 1,000 cases of personal injury/medical malpractice cases and formally reported the potential verdict and full value to insurance companies that retained him to defend their insureds. Mr. Nosich has worked closely with economists and life care planners to identify the relevant damages of those catastrophically injured in his representation of his clients. Mr. Nosich has also tried over 30 cases in Broward County in which a plaintiff suffered catastrophic injuries similar to those of Alicia. Mr. Nosich was tendered and accepted, without objection, as an expert in the evaluation of damages in catastrophic injury cases.

13. In formulating his expert opinion with regard to this case, Mr. Nosich reviewed: Alicia's medical records and expenses; her life care plan prepared by Ms. Salerno; and the economist's report. He took into consideration the reputation of Alicia's lawyer (Mr. Domnick); and the venue in which the

case would be tried. Mr. Nosich opined that Broward County is known for liberal juries who tend to award high amounts in catastrophic cases. He also testified that Mr. Domnick is known as a lawyer with extreme capability and who has an excellent rapport with juries and the ability to get higher dollar verdicts.

14. Mr. Nosich agreed with Mr. Domnick that the estimated $45 million figure for the total value of Alicia's case was conservative. He agreed with Ms. Salerno's estimated economic damages of $15 million and a doubling of that amount ($30 million) for Alicia's noneconomic damages. Mr. Nosich credibly explained that the $45 million total value was very conservative in his opinion based on Alicia's very high past medical bills and the fact that she will never be able to work.

15. The testimony of Petitioner's two experts regarding the total value of damages was credible, unimpeached, and unrebutted. Petitioner proved that the settlement of $2.5 million does not fully compensate Alicia for the full value of her damages.

16. As testified to by Mr. Domnick, Alicia's recovery represents only 5.55 percent of the total value of her claim. However, in applying a ratio to reduce the Medicaid lien amount owed to AHCA, both experts erroneously subtracted attorney's fees and costs of $1.1 million from Alicia's $2.5 million

settlement to come up with a ratio of 3 percent to be applied to reduce AHCA's lien.[2/] Further, in determining the past medical expenses recovered, Petitioner's experts also failed to include the Optum past medical expenses in the amount of $592,554.18.

17. AHCA did not call any witnesses, present any evidence as to the value of damages, or propose a different valuation of the damages. In short, Petitioner's evidence was unrebutted.

18. However, through cross-examination, AHCA properly contested the methodology used to calculate the allocation to past medical expenses.

19. Accordingly, the undersigned finds that Petitioner has proven by a preponderance of the evidence that 5.55 percent is the appropriate pro rata share of Alicia's past medical expenses to be applied to determine the amount recoverable by AHCA in satisfaction of its Medicaid lien.

20. Total past medical expenses is the sum of AHCA's lien in the amount of $608,795.49, plus the Optum past medicals in the amount of $592,554.18, which equals $1,201,349.67. Applying the 5.55 percent pro rata ratio to this total equals $66,674.91, which is the portion of the settlement representing reimbursement for past medical expenses and the amount recoverable by AHCA for its lien.

CONCLUSIONS OF LAW

21. DOAH has jurisdiction over the parties and subject matter in this case, and has final order authority pursuant to sections 120.569, 120.57(1), and 409.910(17)(b), Florida Statutes (2018).

22. AHCA is the state agency authorized to administer Florida's Medicaid program. § 409.902, Fla. Stat.

23. 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.

24. By accepting Medicaid benefits, Medicaid recipients automatically subrogate their rights to any third-party benefits for the full amount of Medicaid assistance provided by Medicaid and automatically assign to AHCA the right, title, and interest to those benefits, other than those excluded by federal law. Section 409.910(6)(c) creates an automatic lien on any such judgment or settlement with a third party for the full amount of medical expenses paid to the Medicaid recipient. However, AHCA's recovery is limited to those proceeds allocable to past medical expenses.

25. Section 409.910(11)(f) establishes the amount of AHCA's recovery for a Medicaid lien to the lesser of its full lien; or 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. In this case, the parties agree the formula results in AHCA recovering the full amount of the lien.

26. However, section 409.910(17)(f) provides a method (default allocation) by which a Medicaid recipient may contest the amount designated as recovered Medicaid expenses payable under section 409.910(11)(f). In order to successfully challenge the amount payable to AHCA, the recipient must prove, 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 by AHCA pursuant to the formula. Gallardo v. Dudek, 263 F. Supp. 3d 1247 (N.D. Fla. 2017).

27. As explained in Smith v. Agency for Health Care Administration, 24 So. 3d 590 (Fla. 5th DCA 2009), evidence of all medical expenses must be presented, as AHCA may recover from the entirety of the medical expense portion--not just the portion that represents its lien. Further, section 409.910(17)(b) grants the undersigned power to find "the portion of the total recovery which should be allocated as past . . . medical expenses," and to limit AHCA to that amount. The statute does not authorize a reduction of the Medicaid lien to the Medicaid-only portion of a recipient's recovery.

28. Where uncontradicted testimony is presented by the recipient, there must be a "reasonable basis in the record" to reject it. Giraldo v. Ag. for Health Care Admin., 248 So. 3d 53 (Fla. 2018). Here, there is no reasonable basis to reject that testimony.

29. In the instant case, Petitioner proved by a preponderance of the evidence that the settlement proceeds of $2.5 million represent only 5.55 percent of Petitioner's claim valued conservatively at $45 million. Therefore, it is concluded that AHCA's full Medicaid lien amount should be reduced by the percentage that Petitioner's recovery represents of the total value of Petitioner's claim.

30. The application of the 5.55 percent ratio to Petitioner's total past medical expenses of $1,201,349.67 results in $66,674.91. This amount represents that share of the settlement proceeds fairly and proportionately attributable to expenditures that were actually paid by AHCA for Petitioner's past medical expenses.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Agency for Health Care Administration is entitled to $66,674.91 from Petitioner's settlement proceeds in satisfaction of its Medicaid lien.

DONE AND ORDERED this 26th day of July, 2019, in Tallahassee, Leon County, Florida.

MARY LI CREASY
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of July, 2019.

ENDNOTES

[1/] The evidence presented was unclear as to whether the amount owed to Optum of $592,554.18 was reduced to the lien of $22,220.78 before or after the 2.5 million settlement agreement. No evidence was presented by Petitioner regarding the actual amount paid by Optum to healthcare providers.

AHCA persuasively argues that Optum's total past medical expenses of $592,554.18 must be included in determining the actual total past medical expenses attributable to Petitioner's care. It is a reasonable inference that it was this greater number, rather than the significantly reduced Optum lien amount, that the life care expert and economist based the calculation of economic damages in the amount of $15 million. Accordingly, the full amount of the expenses incurred by Optum must be included to determine the full amount of medical expenses recovered in the settlement against which AHCA can assert its lien.

[2/] $1.4 million divided by $45 million equals 3 percent.

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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.