

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PEDRO GARCIA, A MINOR BY AND
THROUGH HIS PARENTS AND NATURAL
GUARDIANS, JESUS GARCIA AND
NORMA CISNEROS,

Petitioners,

vs.

Case No. 19-2013MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

FINAL ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings ("DOAH") for final hearing by video teleconference on June 12, 2019, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioners: Floyd B. Faglie, Esquire
Staunton and Faglie, P.L.
189 East Walnut Street
Monticello, Florida 32344

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

STATEMENT OF THE ISSUE

The amount to be paid by Petitioners, Pedro Garcia, a minor by and through his parents and natural guardians, Jesus Garcia

and Norma Cisneros ("Petitioners") to Respondent, Agency for Health Care Administration ("AHCA"), out of the settlement proceeds, as reimbursement for past Medicaid expenditures pursuant to section 409.910, Florida Statutes.

PRELIMINARY STATEMENT

On April 16, 2019, Petitioners filed a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien pursuant to section 409.910(17)(b). The matter was initially assigned to Administrative Law Judge Mary Li Creasy. On April 26, 2019, Judge Creasy entered an Order setting the final hearing for June 12, 2019. On June 3, 2019, the matter was transferred to the undersigned for all further proceedings.

The final hearing was held on June 12, 2019, with counsel for the parties appearing on behalf of their clients. At hearing, Petitioners presented the expert testimony of attorney Edward H. Zebersky. Petitioners' Exhibits 1 through 10 were received in evidence based on the stipulation of the parties. AHCA did not call any witnesses or offer any exhibits into evidence.

The one-volume final hearing Transcript was filed on July 10, 2019. The parties were granted two unopposed extensions of time to file their proposed final orders. The

parties timely filed proposed final orders, which have been considered in preparation of this Final Order.

The facts set forth in the parties' Joint Pre-hearing Stipulation, filed June 3, 2019, have been incorporated herein. References to the Florida Statutes are to the 2018 version.

FINDINGS OF FACT

1. Pedro Garcia ("Pedro") was born on October 30, 2014. When he was two months old, he presented to the emergency room ("ER") with vomiting and excessive crying. The doctors failed to diagnose an intestinal blockage and discharged Pedro home. Pedro was taken again to the ER in dire distress. He was airlifted to a pediatric hospital where emergency surgery was performed to remove 90 percent of his intestine. Pedro now suffers from the effects of having 90 percent of his intestine removed, including: nutritional deficiencies, diarrhea, dehydration, and abdominal distress. He cannot play with exertion and his activities are limited. Pedro will suffer the effects of his injury for the remainder of his life.

2. A portion of Pedro's medical care related to the injury was paid by AHCA through the Medicaid program and Medicaid, through AHCA, provided \$71,230.43 in benefits.

3. Pedro's parents and natural guardians, Jesus Garcia and Norma Cisneros, brought a medical malpractice action against the medical providers and staff responsible for Pedro's care

("Defendants") to recover all of Pedro's damages, as well as their individual damages associated with their son's injury.

4. Because of uncertainty on issues of liability and only a \$250,000 insurance policy on the most culpable defendant, Pedro's medical malpractice action against the Defendants was settled for a confidential unallocated lump sum of \$2,000,000.

5. During the pendency of Pedro's medical malpractice action, AHCA was notified of the action and AHCA asserted a \$71,230.43 Medicaid lien against Pedro's cause of action and settlement of that action. The Medicaid program through AHCA, spent \$71,230.43 on behalf of Pedro, all of which represents expenditures paid for Pedro's past medical expenses.

6. Another non-AHCA Medicaid provider, Integral Quality Care, provided \$223,089.26 in past medical expenses on behalf of Pedro.

7. Another non-AHCA Medicaid provider, Department of Health, Child's Medical Services, provided \$168,161.12 in past medical expenses on behalf of Pedro.

8. Accordingly, a total of \$462,480.81 was paid for Pedro's past medical expenses.

9. AHCA did not commence a civil action to enforce its rights under section 409.910 or intervene or join in Pedro's action against the Defendants. By letter, AHCA was notified of

Pedro's settlement. AHCA has not filed a motion to set-aside, void, or otherwise dispute Pedro's settlement.

10. Application of the formula in section 409.910(11)(f) to Pedro's \$2,000,000 settlement requires payment to AHCA of the full \$71,230.43 Medicaid lien.

11. At the hearing, Petitioners presented the expert testimony of attorney Edward H. Zebersky, who represented Pedro throughout the underlying medical malpractice action against the Defendants. Without objection, Mr. Zebersky was accepted as an expert in the valuation of damages suffered by injured parties.

12. Mr. Zebersky has been an attorney since 1991. Since 1992, Mr. Zebersky has been a plaintiff's trial lawyer, with a substantial portion of his practice devoted to personal injury cases, including medical malpractice matters. He is a partner with the law firm of Zebersky Payne Shaw Lewenz, LLP and AV rated by Martindale-Hubbell. Mr. Zebersky is a member of numerous trial attorney associations and has held leadership positions in several associations, including president of the Florida Justice Association in 2006 and serving on the Board of Governors of the American Association for Justice for the past ten years.

13. Mr. Zebersky handles jury trials. He has secured multiple eight-figure verdicts and several seven-figure

verdicts, and he stays abreast of jury verdicts on other cases in his area.

14. As a routine part of his practice, Mr. Zebersky makes assessments concerning the value of damages suffered by his clients. Mr. Zebersky was accepted as an expert in a Medicaid lien dispute at DOAH in the case of Herrera v. Agency for Health Care Administration, Case No. 16-1270MTR, 2016 Fla. Div. Admin. Hear. LEXIS 493 (Fla. DOAH Oct. 11, 2016).

15. Mr. Zebersky was familiar with the circumstances surrounding Pedro's injury and medical malpractice claims and gave a detailed explanation of them. Mr. Zebersky reviewed Pedro's life care plan, which details Pedro's future medical needs, and an economist report, which calculated the present value of Pedro's future medical care and present value of Pedro's lost future earnings.

16. The economist placed the present value of Pedro's future medical expenses and lost future earnings at approximately \$9,500,000. According to Mr. Zebersky, past medical expenses would also be added to arrive at the full value of Pedro's economic damages. Mr. Zebersky testified that in addition to economic damages, a jury would also be asked to assign a value to past and future noneconomic damages (i.e., pain and suffering and loss of enjoyment of life). Mr. Zebersky testified that Pedro's claim for noneconomic damages would have

an exceedingly high number, which as a "rule of thumb" is three times the value of his economic damages.

17. Mr. Zebersky persuasively and credibly testified that the total value of all of Pedro's damages would be in excess of \$20,000,000, and that valuing Pedro's damages at \$15,000,000 is a very conservative and low valuation of his damages.

18. Mr. Zebersky persuasively and credibly testified that the \$2,000,000 settlement did not fully compensate Pedro for the full value of his damages. Mr. Zebersky testified that based on a conservative value of all of Pedro's damages of \$15,000,000, the \$2,000,000 settlement represents a recovery of 13.33 percent of the full value of his damages.

19. AHCA did not call any witnesses, present any evidence as to the value of damages, or propose a different valuation of damages. Mr. Zebersky's testimony regarding the total value of Pedro's damages was credible, unimpeached, and unrebutted. Petitioner proved that the settlement of \$2,000,000 does not fully compensate Pedro for the full value of his damages.

20. Mr. Zebersky further testified that because Pedro only recovered in the settlement 13.33 percent of the full value of his damages, he only recovered 13.33 percent of AHCA's \$71,230.43 Medicaid lien, or \$9,495.01. Mr. Zebersky testified that it would be reasonable to allocate \$9,495.01 of the

settlement to past medical expenses paid by AHCA through the Medicaid program.

21. Following the settlement, Mr. Zebersky negotiated the non-AHCA Integral Quality Care Medicaid lien from \$233,089.26 to \$18,737.00, and the non-AHCA Department of Health, Child's Medical Services lien from \$168,161.12 to \$22,415.

22. On cross-examination, Mr. Zebersky acknowledged that the \$233,089.26 and \$168,161.12 from Integral Quality Care and Department of Health, Child's Medical Services are part of Pedro's claim for past medical expenses. However, Mr. Zebersky failed to include these past medical expenses in applying the ratio to reduce the Medicaid lien amount owed to AHCA. AHCA successfully contested the methodology used to calculate the allocation to past medical expenses based on Mr. Zebersky's failure to include these past medical expenses in applying the ratio.

23. Accordingly, Petitioners proved by a preponderance of the evidence that 13.33 percent is the appropriate pro rata share of Pedro's past medical expenses to be applied to determine the amount recoverable by AHCA in satisfaction of its Medicaid lien.

24. Total past medical expenses is the sum of AHCA's lien in the amount of \$71,230.43, and the past medical expenses in the amounts of \$233,089.26 and \$168,161.12, which equals

\$462,480.81. Accordingly, following Mr. Zebersky's methodology and applying the \$15,000,000 valuation to the proper amount of total past medical expenses of \$462,480.81, the settlement portion properly allocable to Pedro's past medical expenses to satisfy AHCA's lien is \$61,648.69 ($\$462,480.81 \times 13.33 \text{ percent} = \$61,648.69$).

CONCLUSIONS OF LAW

25. DOAH has jurisdiction over the parties and subject matter of this case pursuant to sections 120.569, 120.57(1), and 409.910(17)(b), Florida Statutes.

26. Medicaid is a joint federal-state program that allows states to provide medical services to residents who cannot afford treatment. As a condition of receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses from Medicaid recipients who recover from legally liable third parties. Giraldo v. Ag. for Health Care Admin., 248 So. 3d 53, 55 (Fla. 2018).

27. AHCA is the state agency authorized to administer Florida's Medicaid program. AHCA is subrogated to any rights a Medicaid recipient may have from any third party to recover the full amount of the past medical expenses paid to the Medicaid recipient. §§ 409.902, 409.910(6), Fla. Stat.

28. Section 409.910(11)(f) provides a statutory formula that AHCA uses in determining the Medicaid lien amount. The

parties agree that application of the statutory formula results in AHCA recovering the full amount of its \$71,230.43 lien.

29. Pursuant to section 409.910(17)(b), a Medicaid recipient may contest the amount payable under the statutory formula in an administrative proceeding at DOAH. In order to prevail in such an action, the Medicaid 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 pursuant to the statutory formula. Giraldo, 248 So. 3d at 54. Although a factfinder may reject uncontradicted testimony, there must be a reasonable basis in the record for doing so. Id. at 56.

30. As detailed above, the unrefuted, uncontradicted, and unimpeached testimony of Mr. Zebersky demonstrates that the \$2,000,000 settlement represents only 13.33 percent of Petitioners' claim valued conservatively at \$15,000,000.

31. The full amount of all past medical expenses (which in this case totals \$462,480.81) must then be considered, not just the past medical expenses representing the amount of AHCA's lien. Fallon v. Ag. for Health Care Admin., Case No. 19-1923MTR, 2019 Fla. Div. Admin. Hear. LEXIS 420 (Fla. DOAH July 26, 2019) (concluding that past medical expenses of \$592,554.18 provided by Optum must be included in calculating total past medical expenses even though this amount was reduced

through negotiation to a lien in the amount of \$22,220.78); Ramella v. Ag. for Health Care Admin., Case No. 17-5454MTR, 2018 Fla. Div. Admin. Hear. LEXIS 92, *20 (Fla. DOAH Feb. 15, 2018) (rejecting Petitioners' contention that non-AHCA lien should not be considered in total past medical expenses for the purpose of applying ratio); Osmond v. Ag. for Health Care Admin., Case No. 16-3408MTR, 2016 Fla. Div. Admin. Hear. LEXIS 454, *16 (Fla. DOAH Sept. 8, 2016) (full amount of medical expenses is the amount to be applied in calculating that portion of the settlement which is available for reimbursement of AHCA's Medicaid lien). Petitioners' contention that the outcome should be different in this particular case because Medicaid, as a payer of last resort, paid for all of Pedro's Medicaid care is a distinction without a difference. All of Pedro's past Medicaid expenses were included in Petitioners' total recovery and claim for past medical expenses.

32. Accordingly, the application of the 13.33 percent ratio to Petitioners' total past medical expenses of \$462,480.81 results in \$61,648.69, which is the settlement portion properly allocable to Pedro's past medical expenses to satisfy AHCA's lien.

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 \$61,648.69 from Petitioners' settlement proceeds in satisfaction of its Medicaid lien.

DONE AND ORDERED this 27th day of August, 2019, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
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 27th day of August, 2019.

COPIES FURNISHED:

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

Floyd B. Faglie, Esquire
Staunton and Faglie, P.L.
189 East Walnut Street
Monticello, Florida 32344
(eServed)

Kim Annette Kellum, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

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

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

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

Mary C. Mayhew, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
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.