

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 DHR 10569

A GREAT CHOICE FOR HOME
CARE, INC.,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Respondent.

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FINAL DECISION

THIS MATTER came on for hearing before the undersigned, Eugene J. Cella, Administrative Law Judge, on September 12, 2013 in Raleigh, North Carolina:

APPEARANCES

For Petitioner: Robert A. Leandro
Parker Poe Adams & Bernstein
150 Fayetteville Street
Suite 1400
Raleigh, North Carolina 27601

For Respondent Brenda Eaddy
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

APPLICABLE LAW

The statutory law applicable to this contested case is N.C. Gen. Stat. Chapter 150B, Article 3, (the "North Carolina Administrative Procedure Act"), N.C. Gen. Stat. Chapter 108C, Articles 1, 2, and 3 and North Carolina Division of Medical Assistance Medicaid and Health Choice Clinical Coverage Policy 3E (effective October 1, 2011) and Clinical Coverage Policy 3C, (effective April 1, 2010 through October 1, 2011).

BURDEN OF PROOF

As Respondent, the North Carolina Department of Health and Human Services has the burden of proof. *See* N.C. Gen. Stat. § 108C-12(d).

ISSUE

Whether Respondent acted in violation of N.C. Gen. Stat. § 150B-23(a) when it sought recoupment from Petitioner in the amount of \$3,632.92 for alleged noncompliance with Medicaid Clinical Coverage Policy 3C.

EXHIBITS

Petitioner's Exhibit 1 was admitted into evidence. This exhibit is:

1. Competency and training documentation for aides employed by Great Choice

Respondents' Exhibits A through E were admitted into evidence. These exhibits are:

- A. Medicaid Provider Enrollment Form for A Great Choice for Home Care, Inc.
- B. Tentative Notice of Overpayment for PI case number 2012-0696
- C. Notice of Decision for PI case number 2012-0696
- D. Spreadsheet for PI case number 2012-0696 (admitted for the limited purposes of documenting the amount paid to Great Choice for each claim audited)
- E. -- DMA Provider Case Summary
-- 10A NCAC 13J .0901
-- 10A NCAC 13J .1107
-- 10A NCAC 13J .1110
-- Clinical Coverage Policy No. 3E, In-Home Care for Adults (effective October 1, 2011)
-- Clinical Coverage Policy No. 3C, Personal Care Services (effective April 1, 2010)

WITNESSES

At the hearing the following witness testimony was received by the Court:

For Petitioner:

Dinez Baker – Owner and Operator, A Great Choice for Home Care, Inc.

For Respondent:

Carol Lukosius – N.C. Department of Medical Assistance, Program Integrity

PRELIMINARY MATTERS

Before the hearing in this case, the Parties filed Cross Motions for Summary Judgment pursuant to N.C. Gen. Stat. § 150(b)-33(b)(3)(a), 36(d) and Rule 56(c) of the North Carolina Rules of Civil Procedure. ALJ's are specifically authorized to grant summary judgment in accordance with N.C. Gen. Stat. § 1A, Rule 56. N.C. Gen. Stat. §150B-36(d) and 26 NCAC 3.0105(6).

Petitioner's Motion for Partial Summary Judgment asserted that the undisputed facts demonstrate as a matter of law that Respondent violated N.C. Gen. Stat. §108C-5(i) by extrapolating results of an audit when the Respondent did not determine that Great Choice failed to substantially comply with State or federal law or regulation or that Respondent had a credible allegation of fraud. Petitioner also asserted that the undisputed facts demonstrated as a matter of law that Respondent violated N.C. Gen. Stat. § 108C-5(j) because Respondent's post-payment review was not performed and reviewed by individuals credentialed by the Department in the matter to be audited.

Respondent's Motion for Summary Judgment asserted that the Agency's decision should be upheld as a matter of law because the undisputed facts show that Petitioner failed to comply with two (2) provisions of Respondent's clinical coverage policy requiring in-home aides training and competency and criminal background checks.

The Court considered Petitioners' Motion for Partial Summary Judgment, Petitioner's Exhibits and Affidavit, Petitioner's Brief in Support of its Motion, Petitioner's Brief in Opposition to Respondent's Motion, Respondent's Motion for Summary Judgment, and Respondent's Brief in Support of its Motion. Respondent submitted no supporting evidence or affidavits to support its Motion or dispute facts set forth in Petitioner's Motion, exhibits, and affidavits.

The Court carefully considered the information submitted by the Parties and found that there were no genuine issues of material fact that DMA had not determined that Great Choice failed to substantially comply with State and federal laws and regulations or had engaged in fraud. The Court also found that the undisputed facts demonstrated that the Agency failed to credential the reviewers that conducted this audit. Based on these undisputed facts, the Court found that as a matter of law the Agency erred and acted in violation of the law by using extrapolation in Great Choice's audit. The Court denied Respondent's Motion for Summary Judgment finding that Respondent failed to submit supporting affidavits or refute evidence and information submitted by Petitioner in response to DMA's Motion.

The Court ordered that the contested case proceed to a hearing with the amount at issue being the actual repayment amount determined by the Department's post-payment review not including extrapolation.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other creditable evidence in the case.

The Parties

1. Petitioner A Great Choice for Home Care, Inc., (“Great Choice” or “Petitioner”) provides personal care services (“PCS”) to Medicaid recipients in North Carolina.

2. Respondent North Carolina Department of Health and Human Services, Department of Medical Assistance (“DMA” “Agency” or “Respondent”) is an administrative agency operating under the laws of North Carolina. DMA oversees the Medicaid program and conducts post-payment reviews of Medicaid services pursuant to 42 CFR §§ 455 *et. seq.* and 10A NCAC 22F.

3. The parties received notice of hearing by certified mail more than 15 days prior to the hearing, and each stipulated on the record that notice was proper.

Background

4. This matter involves a post-payment review conducted by DMA of PCS provided by Great Choice between March 1, 2011, and February 1, 2012 (the “period under review”). (Respondent’s Exhibit B).

5. The PCS program is a North Carolina Medicaid program that provides in-home assistance to the disabled and elderly so that they can remain safely in their homes, avoiding unnecessary and costly institutionalization.

6. PCS aides provide the disabled and elderly with basic in-home care with activities of daily living (“ADLs”) such as eating, skin care, ambulation, bathing, dressing and toileting assistance. (Respondent’s Exhibit E, Clinical Coverage Policy 3C § 1.1). PCS aides also provide assistance with instrumental activities of daily living (“IADLs”) such as food preparation, cleaning and laundry. (Respondent’s Exhibit E, Clinical Coverage Policy 3C § 1.4).

DMA Post-Payment Review

7. The DMA Program Integrity Section conducted an on-site post-payment review of Medicaid claims submitted by Great Choice. DMA’s auditors reviewed documentation

relating to a randomly selected number of Medicaid recipients served by Great Choice. (Respondent Ex. B). The post-payment review included an audit of both clinical and administrative documentation to determine compliance with federal and State laws and regulations as well as compliance with DMA's own clinical coverage policies and other guidance. *Id.*

8. Great Choice was not aware that the post-payment review would take place until the review team arrived at its offices. (Baker, Tr., p. 41). Although DMA will typically conduct an exit conference with the provider at the conclusion of the review, DMA's auditors did not conduct a post review exit conference with Great Choice to discuss its initial findings or inquire about documentation that it could not locate during its review of Great Choice's files. *Id.*

9. On June 7, 2012, DMA sent Great Choice a Tentative Notice of Overpayment (the "Tentative Notice") in which it identified allegedly non-compliant Medicaid claims reviewed during the audit. (Respondent's Ex. B).

10. The Tentative Notice alleged that Great Choice received overpayments in an amount of \$3,632.92 due, in part, to Great Choice's purported failure to comply with Clinical Coverage Policy 3C. *Id.* DMA extrapolated these alleged overpayments to arrive at a total recoupment amount of \$118,692.00. *Id.*

11. Great Choice timely filed a Request for Reconsideration, and a Reconsideration Review Hearing took place on August 8, 2012.

12. During the reconsideration hearing, the discussion regarding aide competency centered around Great Choice's need for a "skills checklist" to demonstrate aide competency. (Baker, Tr., pp. 42, 120-121, 157-158). Great Choice maintained that it properly trained and confirmed that its aides were competent, but acknowledged that it only began completing a "skills checklist" for its aides after the audit period in question. (Baker, Tr., pp. 42, 157-158).

13. On September 25, 2012, the Department of Health and Human Services Hearing Office issued a Notice of Decision with regard to Great Choice's post-payment review, in which the Hearing Officer upheld DMA's tentative overpayment determination. (Respondent's Ex. C).

14. The Department Hearing Officer's decision was based in part on her finding that Great Choice had failed to document aide competency. *Id.*

Contested Case Petition

15. Great Choice timely filed a Petition for Contested Case Hearing before the Office of Administrative Hearings pursuant to N.C. Gen. Stat. § 150B-23.

16. Following discovery, the Parties filed cross motions for summary judgment. By Order dated August 9, 2013, this Court granted Great Choice's Motion for Partial Summary Judgment with regard to DMA's extrapolation of overpayments, concluding as a matter of law that DMA had acted in violation of law and erred by using extrapolation in this audit. *See* August 13, 2013 Order Granting Petitioner's Motion for Partial Summary Judgment.

17. At the commencement of the contested case hearing, DMA stipulated that the only remaining issue for which it is seeking recoupment of funds is whether Great Choice documented its personnel competency training in a manner adequate to satisfy the requirements of Clinical Coverage Policy 3C. (Eaddy, Tr., pp. 4-5; Lukosius pp. 22-23).

Aide Competency Requirement

18. DMA only seeks a recoupment in this case on the grounds that Great Choice failed to document that its aides were competent to provide PCS. (Eaddy, Tr., pp. 4-5; Lukosius pp. 22-23). DMA provided evidence of no other deficiencies or policy violations by Great Choice that supports the overpayment determination.

19. Clinical Coverage Policy 3C and Clinical Coverage Policy 3E were in effect at the time of the audit. (Respondent's Ex. E).

20. Section 7.10.3 of Clinical Coverage Policy 3C and Clinical Coverage Policy 3E requires that providers of PCS maintain an individual file that documents aide training and competency and provides evidence that the aide meets the competence standards provided in 10A NCAC 13J .1107 and .1110. *Id.*

21. There is no specific form(s) that Medicaid PCS providers must use to document that each aide has been trained and is competent to provide PCS. (Lukosius, Tr., pp. 36-37).

22. DMA policy does not dictate the manner by which a provider documents that its aides have been trained and are competent to provide PCS. Instead, the policy only requires that that competency verification is documented by the provider. (Lukosius, Tr., pp. 36-37).

23. While a "skills checklist" is an example of one way a PCS provider can document that an aide is competent to provide services, aide competency can be documented by means other than a skills checklist or narrative documentation. (Lukosius, Tr., pp. 24, 36-37).

24. The Agency offered no testimony or evidence of the specific Medicaid paid claims for which it alleged Great Choice was missing aide competency documentation.

25. DMA failed to provide any evidence of the individual aides which it alleged provided services without having the proper aide competency documentation.

Great Choice's Evidence of Aide Competency Training

26. Dinez Baker, the owner and operator of Great Choice, testified that her agency complied with the aide competency requirements contained in the Clinical Coverage Policy. (Baker, Tr., pp. 42-49).

27. Specifically, Great Choice organized training sessions with its new aides. (Baker, Tr., p. 42). These training sessions were conducted by a registered nurse. *Id.*

28. As a part of the training sessions, aides were asked to watch a video that described and demonstrated the skills necessary to provide PCS. *Id.* The video also offered information on additional topics such as food safety, infection control, blood-borne illness and identifying signs of depression. (Baker, Tr., p. 44). While training on these additional subjects is not required, Great Choice believed that such training would be useful to its aides. (Baker, Tr., p. 50).

29. At the conclusion of the video presentation, the registered nurse required each aide to demonstrate the personal care skills taught during the video presentation. (Baker, Tr., p. 42). If the skill demonstration was sufficient, the aide was then asked to complete a true/false test that covered some of the topics presented during the video presentation. (*Id.*; Petitioner's Ex. 1).

30. If the aide was able to sufficiently demonstrate the necessary skills to the registered nurse and pass the written tests, Great Choice would issue certificates of completion to the aides which documented their competency in the subject area. (Baker, Tr., p. 42). One of the certificates issued as a part of the training specifically documented that the aide passed the PCS training requirements and was competent to provide PCS. *Id.*

31. Great Choice has PCS training certificates for each of its aides. (Petitioner's Ex. 1). The training certificates were in Great Choice's file at the time the audit took place and were issued on or around the date the aide was hired by Great Choice and prior to the dates of service that were audited by DMA. (Baker, Tr., p. 49; Petitioner's Ex. 1).

32. Ms. Lukosius did not participate in the on-site review of Great Choice. (Lukosius, Tr., p. 8). Agency failed to provide any testimony regarding the documentation it reviewed in making its determination that Great Choice had not properly documented training and skills competency. The Agency did not provide any testimony to contradict the testimony of Ms. Baker that the PCS training certificates were in its file and available for review during the audit. view.

33. Because the DMA audit team did not have an exit conference with Great Choice at the conclusion of its audit, Great Choice was not able to direct the auditors to these certificates or have a conversation with the auditors regarding why it did not maintain "skills checklists" for its aides but instead issued training certificates. (Baker, Tr., p. 49).

CONCLUSIONS OF LAW

To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein as Conclusions of Law. Based upon the foregoing Findings of Fact, the undersigned makes the following Conclusions of Law:

1. All parties are properly before the Office of Administrative Hearings, and this tribunal has jurisdiction of the parties and of the subject matter at issue.
2. An ALJ need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).
3. Under N.C.G.S. §108C-12(d), DMA has the burden of proof in this matter.
4. DMA failed to provide any evidence of the specific claims at issue or the names of the aides which it alleged did not have the proper competency documentation.
5. DMA did not meet its burden of proof in demonstrating Great Choice's failure to document aide training and competency.
6. Clinical Coverage Policy 3C (effective April 1, 2010) and Clinical Coverage Policy 3E (effective October 1, 2011) does not require PCS providers to document that its aides have been properly trained and are competent to provide PCS services in a specific format or on a specific form.
7. Because DMA's policy does not require that training and competency must be documented in a certain format or manner, PCS providers must create their own documentation to confirm that their aides were trained and are competent to provide services.
8. The training certificates issued by Great Choice sufficiently document aide competency and training and meet the documentation requirements of Clinical Coverage Policy 3C.
9. Although Great Choice has no burden of proof in this case, it demonstrated that its aides were properly trained in accordance with Clinical Coverage Policy 3C.
10. The Agency has acted erroneously, contrary to its own policy, and in excess of its authority by finding that Great Choice was overpaid in the amount of \$3,632.92.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, Respondent DMA's decision to recoup \$3,632.92 is hereby REVERSED.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the

Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 15th day of April, 2014.

Eugene J. Cella
Administrative Law Judge