

STATE OF NORTH CAROLINA
COUNTY OF

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13DHR09727

CARING HANDS HOME HEALTH INC, Petitioner, v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.	FINAL DECISION
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THIS MATTER came on for hearing before Beecher R. Gray, Administrative Law Judge, August 9, 2013, in Raleigh, North Carolina. Petitioner submitted a proposed decision on October 30, 2013. On April 3, 2013, Respondent filed a Motion to Dismiss this contested case for lack of subject matter jurisdiction because it was untimely filed. Petitioner filed a written response in opposition to the Motion on April 16, 2013. Respondent's Motion to Dismiss was DENIED in an Order entered on April 17, 2013. At the outset of this contested case hearing, Counsel for Respondent orally renewed Respondent's earlier written Motion to Dismiss. The oral Motion to Dismiss was DENIED on the record. Counsel for Respondent announced that Respondent would not offer any exhibits or produce any evidence, relying instead solely on its Motion to Dismiss.

APPEARANCES

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APPLICABLE LAW

The laws and regulations applicable to this contested case are 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 10A NCAC 22F.

BURDEN OF PROOF

Under N.C. Gen. Stat. § 108C-12(d), Respondent North Carolina Department of Health and Human Services has the burden of proof as to any “adverse determination.” The definition of “adverse determination” includes the decision to recoup funds from Petitioner. *See* N.C. Gen. Stat. § 108C-2(1).

As to the decision to dismiss Petitioner’s Reconsideration Review Request, because this is not an “adverse determination” as defined by N.C. Gen. Stat. § 108C-2(1), Petitioner has the burden of proof.

ISSUES

The issues to be resolved in this case are whether Respondent violated the standards of N.C. Gen. Stat. § 150B-23 when it determined through a post-payment review conducted by its contractor, the Public Consulting Group, that Caring Hands was overpaid in the amount of \$328,623.00 and whether the Respondent’s Departmental Hearing Office erred when it dismissed Caring Hands’ Reconsideration Review Request.

EXHIBITS

Petitioner’s Exhibits (“P. Exs.”) 9-13 and 20-65 were admitted into evidence.

The Undersigned also takes judicial notice of and has considered documents filed in this case prior to the hearing, including the Verified Petition and attached exhibits and the Affidavit of Richelle Wilkins and attached exhibits.

Respondent presented no exhibits and no evidence during the hearing.

WITNESSES

Petitioner presented the testimony of Richelle Wilkins, the owner and operator of Caring Hands.

Respondent presented no witnesses during the hearing.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witness presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, including the undisputed affidavit of Richelle Wilkins and the Verified Contested Case Petition, 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 witness 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 Caring Hands provides personal care services (“PCS”) to Medicaid recipients in North Carolina.
2. Respondent North Carolina Department of Health and Human Services (the “Agency” or “Respondent”) is an administrative agency operating under the laws of North Carolina. The Agency oversees the Medicaid program through its Division of Medical Assistance (“DMA”). DMA conducts post-payment reviews of Medicaid services under 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.
4. Respondent’s Counsel made no objection to the hearing date or time. However, Respondent provided no testimony or evidence on any of the issues raised by Petitioner. Respondent instead stated that the Agency would rely on the jurisdictional argument made in its previous Motion to Dismiss, which was not supported by any affidavits or exhibits. Respondent’s Motion was denied by the undersigned on April 17, 2013.

Contested Actions

5. On or around Monday, December 3, 2012, Caring Hands received a letter titled “Tentative Notice of Overpayment” (“Tentative Notice”) dated November 27, 2012. The Tentative Notice was sent to Caring Hands by the Public Consulting Group (“PCG”) on PCG letterhead. (P. Ex. 9; Testimony of Richelle Wilkins)
6. The Tentative Notice informed Caring Hands that, as a result of a post-payment review conducted by PCG, Medicaid overpayments had been identified in the amount of \$328,623.00. (*Id.*)
7. The PCG Notice made clear that the Notice and Findings were tentative in nature and not final. (*Id.*)

8. The alleged overpayment amount was based upon the review of recipient records for only 100 individual dates (“claims”) for which Caring Hands provided services between August 1, 2010 and August 31, 2011. (*Id.*)
9. Based on PCG’s review of these 100 claims, PCG tentatively determined that Caring Hands had been overpaid in the amount of \$2,658.54. (*Id.*)
10. PCG then extrapolated its tentative findings to all Medicaid payments made to Caring Hands between August 1, 2010 and August 31, 2011 to determine a “tentative overpayment amount” of \$328,623.00. (*Id.*)
11. PCG indicated in the Tentative Notice that Caring Hands had the right to seek an informal reconsideration with the Department Hearing Office under 10A NCAC 22F .0402. (*Id.*)
12. PCG’s Tentative Notice provided a one-page form that Caring Hands could complete and send to the Department Hearing Office to begin the reconsideration process. (*Id.*) The Tentative Notice stated that Caring Hands had 15 business days from receipt of PCG’s Tentative Notice to seek reconsideration. (*Id.*)
13. The Tentative Notice also stated that Caring Hands had no less than 30 days to submit additional documentation that was not provided during the original audit to the Department Hearing Office for review. (*Id.*)
14. On Monday, December 12, 2012, Caring Hands completed the one page Reconsideration Request form for the PCG post-payment review at issue in this case (“Reconsideration Request”). Richelle Wilkins signed the form, addressed the mailing envelope, and stamped it for mailing to the Department Hearing Office. Before mailing the request, Caring Hands made a copy of the completed Reconsideration Request form. (P. Ex. 10; Testimony of Richelle Wilkins)
15. Caring Hands mailed the Reconsideration Request on Monday, December 12, 2012, by depositing the Reconsideration Request in an outgoing mailbox which is checked daily (Monday through Friday) by the U.S. Postal Service. The Reconsideration Request was sent by Caring Hands well before the fifteen business day deadline set forth in the PCG Tentative Notice. (Testimony of Richelle Wilkins)
16. After Caring Hands submitted its Reconsideration Request form, it began gathering additional documentation to support its appeal, as instructed by the PCG Tentative Notice. (Testimony of Richelle Wilkins)
17. On January 17, 2013, Caring Hands sent additional documentation to the Department Hearing Office, which it contends disputed the findings. Because the information sent to the Department Hearing Office contained medical records, Caring Hands sent its package via Certified Mail to the Department Hearing Office. (Testimony of Richelle Wilkins)

18. On January 25, 2013, Caring Hands received a “Notice of Dismissal” dated January 22, 2013 from the Department Hearing Office. The Notice of Dismissal stated that the additional documentation sent by Caring Hands on January 17, 2013, was received after the 15 business-day deadline. (Testimony of Richelle Wilkins; Verified Petition, Ex. B)
19. The January 25, 2013 Notice of Dismissal did not reference the previously mailed Reconsideration Request and based its dismissal solely on the date the Hearing Office received the additional documentation sent by Caring Hands. (*Id.*)
20. The Notice of Dismissal was the first communication that Caring Hands received from a State Agency. The Agency never has provided Caring Hands with any written notice that PCG’s Tentative Notice was final or had been adopted by the Agency. (Testimony of Richelle Wilkins)
21. The Agency provided no testimony or evidence regarding the basis for dismissing Caring Hands’ Reconsideration Request following Petitioner’s receipt of PCG’s Tentative Notice of Overpayment. The Agency failed to provide any evidence that the Agency did not receive Caring Hands’ December 12, 2012 Reconsideration Request.
22. On January 31, 2013, Caring Hands received a Remittance and Status Report from the Agency dated January 31, 2013. The Remittance and Status Report states:

Alert! May be subjected to penalty and interest or adjustments processed. Monies are due back to Medicaid. Per N.C. Statute 147, this RA serves as your required dunning notification. All outstanding adjustment balances must be paid within 30 days or a 10% one-time penalty will be assessed and interest will be charged. (Wilkins Affidavit, Ex. A, p. 33)
23. The Agency did not provide Caring Hands with any written notice that PCG’s Tentative Notice was final or had been adopted by the Agency. The January 31, 2013 Remittance and Status Report was the only communication that Caring Hands received from the Agency indicating that it was seeking to recoup the alleged overpayment identified in PCG’s Tentative decision.
24. Caring Hands filed a Contested Case Petition challenging the decision to dismiss its Reconsideration Request on the grounds that it had timely requested a reconsideration of PCG’s Tentative Notice of Overpayment.
25. Caring Hands’ Petition also requested that the Office of Administrative Hearings determine that the findings of the Tentative Notice were erroneous and requested that the Undersigned find that Caring Hands owed no funds to the Agency based on PCG’s review and the Tentative Notice.

PCG's Post-Payment Review Findings

26. At the Contested Case Hearing, the Agency provided no testimony or evidence as to the basis for the Tentative Findings made by PCG.
27. The Agency provided no testimony or evidence to support PCG's tentative findings that all or part of the 100 claims that PCG reviewed were determined to be out of compliance with State or federal law or regulation, Clinical Coverage Policy 3C, or any other policy or guidance issued by the Agency.
28. The Agency provided no testimony or evidence as to whether it agreed with any or all of PCG's tentative findings and the amount that it believes should be recouped from Caring Hands.

PCG's Extrapolation of the Post-Payment Findings

29. PCG's Tentative Notice indicated that--based on the review of 100 claims--it was extrapolating the overpayment amount to include every claim billed by Caring Hands during the selected review period. (P. Ex. 9)
30. The Agency provided no testimony or evidence as to the basis for the extrapolation, the reason for the use of extrapolation, the extrapolation methodology, or whether it supported the use of extrapolation as set forth in PCG's Tentative Notice.
31. The Agency provided no evidence or testimony that Caring Hands failed to substantially comply with State or federal law or regulations.
32. The Agency provided no evidence or testimony that the PCG reviewers in this case were credentialed by the Department in the matters to be audited.
33. The Agency provided no evidence or testimony that the extrapolation was conducted using disproportionate stratified random sampling. The random sampling description that was included in the Tentative Notice of Overpayment contains no information stating that a disproportionate stratified random sample of claims was reviewed. (P. Ex. 9, p. 24)
34. The Department's Provider Claims Sampling and Extrapolation Authorization and Procedures Manual states that stratified samples should be used in extrapolation and that the number of strata must be between 2 and 4 inclusive. (P. Ex. 11)

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 properly are before the Office of Administrative Hearings.
2. An ALJ need not make findings as to every fact which arises from the evidence and need find only 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. The sixty (60) day time period for filing a contested case under N.C. Gen. Stat. § 150B-23(f) commences when notice is given of the agency decision to all persons aggrieved. Such notice must be in writing and must set forth the agency action.
4. Based upon the uncontroverted evidence produced in this hearing, Caring Hands timely appealed the Departmental Hearing Office's decision to dismiss Petitioner's Reconsideration Request because it filed a Petition for Contested Case within sixty (60) days of the Departmental Hearing Office's Notice of Dismissal.
5. 10A NCAC 22F .0402 requires that a provider such as Petitioner has fifteen working days to request a Reconsideration Review of a tentative decision.
6. The evidence in this record demonstrates that Caring Hands met its burden to show that it timely requested a Reconsideration Review from the Departmental Hearing Office.
7. Based on the evidence in the record, Respondent substantially prejudiced Petitioner's rights by dismissing Caring Hands' Reconsideration Review Request.
8. Based on the evidence in the record, the Agency erred and acted contrary to its own rules when it issued a Notice of Dismissal of Caring Hands' Request for Reconsideration.
9. As it relates to the recoupment action, N.C. Gen Stat. § 150B-23(f) allows a person aggrieved by an "agency decision" sixty (60) days after notice is given to appeal such decision to the Office of Administrative Hearings. Such notice must be in writing and must set forth the agency action.
10. N.C. Gen. Stat. § 150B-2(1a) defines "Agency" to mean an agency or an officer in the executive branch of the government of this State.
11. PCG is not an Agency as defined by N.C. Gen. Stat. § 150B-2(1a).
12. The PCG Tentative Notice does not constitute an "agency decision" under N.C. Gen. Stat. § 150B-23(f) because it was issued by a private contractor and not by an "Agency" as defined by the North Carolina Administrative Procedure Act.
13. Even if PCG could be considered an "Agency" for the purposes of commencing the sixty (60) day time period for filing a contested case, the PCG Tentative Notice does not

constitute an “agency decision” under N.C. Gen. Stat. § 150B-23(f) because it is tentative notice and not a decision.

14. Caring Hands timely appealed the Agency’s decision to recoup funds based on the PCG audit because it filed a Petition for Contested Case within sixty (60) days of receiving the January 31, 2013 Remittance Advice and Status Report indicating that DMA was attempting to recoup funds from Caring Hands.
15. N.C. Gen. Stat. § 108C-12(d) states that “the Department shall have the burden of proof in appeals of Medicaid providers or applicants concerning an ‘adverse determination.’” N.C. Gen. Stat. § 108C-2(1) defines an “adverse determination” to include a decision by the Department to recoup Medicaid payments.
16. As to the Agency’s determination that it would recoup funds from Caring Hands as set forth in the January 31, 2013 Remittance Advice and Status Report, Respondent Agency has the burden of proof.
17. Respondent failed to meet its burden of proof demonstrating that Caring Hands had been overpaid by Medicaid in any amount or that any recoupment was appropriate and supported by the evidence.
18. The Agency failed to provide any testimony or evidence to support the recoupment, including, but not limited to: (1) the claims reviewed during the audit; (2) the finding for each claim reviewed; (3) the amount of the recoupment sought for each claim reviewed; or (4) the basis of the finding that the documentation reviewed evidenced any violation of law, rule, or policy.
19. Based on the lack of any evidence in the record that any recoupment is appropriate, the Agency substantially prejudiced Petitioner’s rights by attempting to recoup funds from Caring Hands.
20. Based on the lack of any evidence in the record that any recoupment is appropriate, the Agency erred and acted contrary to rule and law by attempting to recoup funds from Caring Hands based on PCG’s tentative findings.
21. 10A NCAC 22F .0302(c) states that, when conducting an audit of a Medicaid provider, the Agency must:

[r]eview the findings, conclusions, and recommendations [of the investigation of provider abuse] and make a tentative decision for disposition of the case from among the following administrative actions:

- (1) To place provider on probation with terms and conditions for continued participation in the program.
- (2) To recover in full any improper provider payments.
- (3) To negotiate a financial settlement with the provider.

- (4) To impose remedial measures to include a monitoring program of the provider's Medicaid practice terminating with a "follow-up" review to ensure corrective measures have been introduced.
 - (5) To issue a warning letter notifying the provider that he must not continue his aberrant practices or he will be subject to further division actions.
 - (6) To recommend suspension or termination.
- 22. The Agency provided no testimony or evidence to show that either PCG or the Agency reviewed PCG's findings and made a determination regarding whether recoupment would be the appropriate administrative action.
- 23. The Agency acted contrary to rule and failed to use proper procedure by not providing evidence or testimony that it reviewed the tentative findings to determine the appropriate administrative action that should have been taken as required by 10A NCAC 22F .0302.
- 24. Under N.C. Gen. Stat. § 108C-5(i), in order for the Agency to use extrapolation when conducting an audit of Medicaid providers, it must determine that the provider "failed to substantially comply with State law or regulation."
- 25. The Agency did not meet its burden of proof that Caring Hands failed to substantially comply with State or federal law or regulation, as it put forward no testimony or evidence of the alleged violations found during the PCG audit.
- 26. Under N.C. Gen. Stat. § 108C-5(i), in order to use extrapolation, the Agency is required to issue credentials to auditors in the matter to be audited.
- 27. The Agency did not meet its burden of proof that the PCG auditors were credentialed by the Department in the review of personal care services.
- 28. The Agency erred and acted contrary to law and rule by attempting to extrapolate PCG's tentative findings. The Agency failed to demonstrate that Caring Hands did not substantially comply with State or federal law or regulation, failed to demonstrate that the auditors used in this case were credentialed by the Department, and failed to demonstrate that it used disproportionate stratified random sampling when conducting this audit.
- 29. The Agency erred and acted contrary to law and rule by attempting to extrapolate PCG's tentative findings.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, I find that Petitioner's request for a reconsideration review was timely under the evidence produced in this contested case hearing and that Respondent DMA's decision to recoup any funds from Caring Hands--

based on the PCG post-payment review--is not supported by the evidence or applicable law, which should be, and hereby is, REVERSED.

As to the Undersigned's decision regarding the Agency's adverse determination to recoup funds, which is subject to N.C. Gen. Stat. § 108C, the Agency delayed its filing of a response to Petitioner's Motion for Stay beyond the ten (10) days allowed by the rules that govern this forum. Respondent further filed a Motion to Dismiss, which was not supported by any affidavit or testimony, which was heard by the Undersigned. Such delays extend this forum's time for entering the Final Decision, to the extent that an extension is required.

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 5th day of December, 2013.

Beecher R. Gray
Administrative Law Judge