STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 DHR 16643

Carolina Behavioral Care, PA, Petitioner, v. N.C. Department of Health and Human Services, Division of Medical Assistance, Respondent.	**ORDER OF SUMMARY JUDGMENT**

THIS MATTER comes before the Honorable Donald W. Overby, Administrative Law Judge presiding, for consideration of Petitioner's Motion for Partial Summary Judgment filed with the Office of Administrative Hearings ("OAH") on June 5, 2014. This matter was previously scheduled for a contested case hearing on May 12, 2014; however, that hearing was converted into an informal settlement conference. The Parties made some progress toward settlement; however, final resolution was not achieved as is set forth in the Joint Status Report filed by the parties with OAH on May 20, 2014. It was discussed between the parties and the undersigned at the settlement conference that Petitioner would file the Motion for Summary Judgment currently under consideration. Respondent has not filed a response.

UNDISPUTED FACTS

1. There are three post-payment audits at issue herein.

2. In *PI Case Number 2012-1160* the Agency sent its Tentative Notice of Overpayment ("TNO") to Petitioner on February 15, 2013. The TNO contained an extrapolated amount of $322,706.00 which Respondent contends is the amount of Medicaid overpayment to Petitioner.

3. In *PI Case Number 2012-1030* the Agency sent its Tentative Notice of Overpayment ("TNO") to Petitioner on July 10, 2013. The TNO contained an extrapolated amount of $108,785.00 which Respondent contends is the amount of Medicaid overpayment to Petitioner.

4. In *PI Case Number 2012-1029* the Agency sent its Tentative Notice of Overpayment ("TNO") to Petitioner on July 10, 2013. The TNO contained an extrapolated amount of $57,835.00 which Respondent contends is the amount of Medicaid overpayment to Petitioner.

5. Each of the TNOs contained both the notice as required and an extrapolated amount of purported overpayment which Respondent seeks to recover.

Having considered the submissions of the parties as well as matters of record appropriate for consideration, this Tribunal concludes as a matter of law as follows:

CONCLUSIONS OF LAW

1. Respondent's Program Integrity Unit and its authorized agents, PCG, conduct post-payment reviews of Medicaid paid claims to identify program abuse and overpayments in accordance with 42 USC § 1396a, 42 CFR 455 & 456, and 10A NCAC 22F.

ISSUE 1

2. The first issue to be addressed is whether Respondent DMA violated N.C. Gen. Stat. § 108C-5(i) by failing to provide Petitioner proper notice prior to extrapolation? This issue has been addressed by the undersigned in prior orders, and this order is consistent with those prior orders.

3. N.C. Gen. Stat. § 108C-5 describes the process Respondent or its agent must follow in seeking recoupment of any overpaid Medicaid funds from a Medicaid provider. N.C. Gen. Stat. § 108C-5(k) states:

> The Department, prior to conducting audits that result in the extrapolation of results, shall identify to the provider the matters to be reviewed and specifically list the clinical, including, but not limited to, assessment of medical necessity, coding, authorization, or other matters reviewed and the time periods reviewed. (Emphasis added)

4. N.C. Gen. Stat. § 108C-5(i) provides:

> Prior to extrapolating the results of any audits, the Department shall demonstrate and inform the provider that (i) the provider failed to substantially comply with the requirements of State or federal law or regulation or (ii) the Department has credible allegation of fraud concerning the provider. (Emphasis added)

5. In this case, there are no allegations that Petitioner committed any fraud.

6. N.C. Gen. Stat. § 108C-5(p) provides:

> The provider shall have no less than 30 days from the date of the receipt of the Department's notice of tentative audit results to provide additional documentation not provided to the Department during any audit.

7. Reading N.C. Gen. Stat. § 108C-5 in its entirety, and in context with the applicable provisions of 42 CFR 455 & 456, and 10A NCAC 22F, N.C. Gen. Stat. § 108C-5 requires Respondent to demonstrate and to inform Petitioner that Petitioner "failed to substantially comply" with the applicable State and Federal law or regulation before Respondent extrapolates the results of any audits. The purpose of N.C. Gen. Stat. § 108C-5(i) is to allow the provider time to submit additional documentation to Respondent before an extrapolation of any overpayment.

8. In this case, there is no genuine issue of material fact that Respondent violated N.C. Gen. Stat. § 108C-5(i) when it simultaneously notified Petitioner in each of the three TNOs that Petitioner failed to substantially comply with the State and federal requirements, and that Petitioner owed an extrapolated overpayment amount in each case based on such audit findings.

9. The problem is that the TNO was issued with an extrapolated amount in the same notice. Such is not in accord with N.C. Gen. Stat. § 108C-5 which establishes procedures which must take place prior to the extrapolation. In this instance, the notice and the extrapolated amount were set out simultaneously.

10. By Respondent violating the procedural requirements of N.C. Gen. Stat. § 108C-5(i), the extrapolated recoupment amounts sought to be recovered set out in the TNOs of $322,706.00, $108,785.00, and $57,835.00 respectively are invalid and void. It is the extrapolated amounts which are void and not the entire TNO. Petitioner is entitled to summary judgment as matter of law as to that issue, and Respondent may not recoup those extrapolated recoupment/overpayment amounts from Petitioner.

11. N.C. Gen. Stat. § 108C-5(p) gives the provider 30 days from the notice (TNO) in which to provide additional documentation. Therefore, any extrapolation performed thirty days after the TNO is not in violation of this provision and could be given consideration.

12. Petitioner's motion for Summary Judgment is ALLOWED as to any extrapolation amounts given simultaneously with the TNO or performed within thirty days of the TNO. Petitioner's motion for Summary Judgment is DENIED as to any subsequent extrapolations conducted by the Respondent 30 days after the TNO, and any such extrapolations and alleged overpayments may be introduced by the Respondent at the contested case hearing of this matter and sought to be recoverd.

ISSUE 2

13. The second issue to be addressed is whether the Respondent has relied upon an un-promulgated rule in order to extrapolate amounts considered to be overpayments.

14. The standard at issue herein is the Agency's reliance on a standard wherein the provider is deemed to have been in non-compliance with federal and/or state law or regulation if the provider's claims reviewed has five percent (5%) or more in error. There apparently is no

question that this standard has not been properly promulgated as a rule as required by Article 2A of Chapter 150B of the North Carolina General Statutes.

15. Application of an un-promulgated rule as a standard is error. However, in this instance, there is not sufficient information as to how it was applied to this Petitioner, what actual rate of error the Petitioner's claims may have had, and whether or not a test of reasonableness would be appropriate in the absence of an appropriate rule. Therefore, judgment is reserved as to this issue alone.

ISSUE 3

16. Issue Three is closely akin to Issue five in that it deals with the validity of the consent forms signed by either the recipient or his/her caretaker.

17. In Issue Three the Petitioner relies principally on N.C. Gen. Stat. § 90-21.13 which states there is a presumption of validity in consent forms under certain circumstances. Petitioner thus contends that it is error for Respondent to seek recoupment of overpayment based on the validity of the consent forms. Further Petitioner contends that Respondent has the burden of proof and cannot prevail.

18. 10A NCAC 22F .0107 provides that all providers "shall keep and maintain all Medicaid financial, medical, or other records necessary to fully disclose the nature and extent of services furnished to Medicaid recipients and claimed for reimbursement."

19. Thus in post payment reviews, the burden is on the provider to produce certain documentation to validate that the provider has indeed complied with state and federal requirements. While the ultimate burden of proof is on Respondent in the contested case hearing, provider cannot rest on its laurels in at least the initial phases of the post payment reviews. A blanket assertion which in essence would make all consents valid without any further showing is not supported.

20. It is not completely clear to what extent if any signatures are completely missing, or signatures not dated, or if the information is missing as set out in Issue Five.

21. Even if there is a presumption of validity of the signatures, the provider should produce what information they have and be given an opportunity to correct any deficiencies in accord with N.C. Gen. Stat § 108C-5(o).

22. There remains a genuine issue of material fact as to this issue and therefore Petitioner's Motion for Summary Judgment is DENIED as to this issue.

ISSUE 4

23. The fourth issue is whether or not the Respondent applied inapplicable Clinical Coverage Policy and/or rules.

24. There seems to be no question that the Clinical Policy used in performing the audits in question was not in effect at the time the services were performed and Petitioner paid from Medicaid monies.

25. N.C. Gen. Stat. § 108C-5(i) requires Respondent to inform providers that they have "failed to substantially comply with the requirements of State or federal law or regulation." It would seem that proper notice would require a statement in particularity of which state and/or federal laws or regulations have been violated. Arguably, N.C. Gen. Stat. § 108C-5(i) does not require the Respondent to the TNO to specify upon what authority Respondent is relying; however, that may be an argument for another day. It is clear that applying the wrong Clinical Coverage Policy is plain error without regard to any notice given.

26. Likewise, without regard to the timing of the reference to rules 10A NCAC 27G .0205 and .0206, those rules do not apply to the providers at issue herein.

27. As to this issue there is no genuine issue of material fact and therefore Petitioner's Motion for Summary Judgment is ALLOWED as to this issue.

ISSUE 5

28. Issue Five is closely akin to Issue Three in that it deals with the validity of the consent forms signed by either the recipient or his/her caretaker.

29. N.C. Gen. Stat § 108C-5(o) allows the provider to make corrections of clerical, scrivener, computer errors and the like prior to the final audit. Petitioner contends that such errors were made in transferring its records to an electronic format when parts of some files were not copied leaving off signatures and/or dates.

30. As stated above and in accord with 10A NCAC 22F .0107, in post payment reviews, the burden is on the provider to produce certain documentation to validate that the provider has indeed complied with state and federal requirements. While the ultimate burden of proof is on Respondent in the contested case hearing, provider cannot rest on its laurels in at least the initial phases of the post payment reviews.

31. Even if there is a presumption of validity of the signatures, and even if there clerical and/or computer errors, the provider should produce what information they have and be given an opportunity to correct any deficiencies in accord with N.C. Gen. Stat § 108C-5(o).

32. There remains a genuine issue of material fact as to this issue and therefore as to this issue, Petitioner's Motion for Summary Judgment is DENIED.

FINAL DECISION

Based upon the foregoing Conclusions of Law, Summary Judgment is **ALLOWED IN PART** and **DENIED IN PART** for the Petitioner as to Issue 1; as to Issue 2, judgment is reserved;

as to Issues 3 and 5, Summary Judgment is **DENIED** without prejudice; and as to Issue 4, Summary Judgment is **ALLOWED**.

NOTICE

Under the provisions of N.C. Gen. Stat. § 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 in which the party resides. 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 26 N.C. Admin. Code 03.0120, and the Rules of Civil Procedure, N.C. Gen. Stat. § 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 the Superior Court within 30 days of receipt of the Petitioner 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 11th day of August, 2014.

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Donald W. Overby
Administrative Law Judge