

STATE OF NORTH CAROLINA
COUNTY OF CATAWBA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DHR 08051

<p>Christopher H Brown, DDS, PA Petitioner,</p> <p>v.</p> <p>NC Department Of Health And Human Services, Division of Medical Assistance Respondent.</p>	<p>FINAL DECISION</p>
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The above-captioned case came on for hearing before Administrative Law Judge (“ALJ”) David F. Sutton on May 27, 2016, in Morganton, North Carolina. Petitioner Christopher H. Brown, DDS, PA (“Petitioner” or “Brown”) was present and represented by his counsel, Knicole Emanuel. Respondent North Carolina Department of Health and Human Services (“DHHS”), Division of Medical Assistance (“DMA”) was represented by Brenda Eaddy of the Attorney General’s Office. The above-captioned case had previously been noticed for hearing on February 4, 2016, and April 15, 2016, however, the February 4, 2016, hearing was continued upon good cause shown by the Petitioner, and the April 15, 2016, hearing was continued upon good cause shown by the Respondent.

APPEARANCES OF COUNSEL

For Petitioner: Knicole C. Emanuel
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For Respondent DHHS/DMA: Brenda Eaddy
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ISSUE

Whether Respondent DHHS/DMA, erred, exceeded its authority or jurisdiction, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule when it made the decision, after a Reconsideration Review hearing, to uphold two May 13, 2015, Tentative Notices of Overpayment (“TNOs”) of Program Integrity Case Numbers 814-01024 and 814-01221 issued by its contractor, Public Consulting Group, (“PCG”) determining that Petitioner was overpaid for Medicaid services rendered to Medicaid recipients under the Medicaid for Pregnant Women (“MPW”) program class for dates of service from February 17, 2010, to May 4,

2013, in the amount of \$3,317.40 and for dates of service from April 2, 2010, to April 23, 2013, in the amount of \$2,516.61.

APPLICABLE STATUTES, RULES AND POLICIES

42 U.S.C. §§ 1396a – 1396v;
45 C.F.R. Parts 455 and 456;
N.C. General Statutes Chapter 108A, Article 2, Parts 1 and 6;
N.C. General Statute 150B-22 *et seq.*;
N.C. General Statutes Chapter 108C;
10A N.C.A.C. Chapter 22F;
10A N.C.A.C. Chapter 25H;
Respondent DMA’s Clinical Coverage Policies; and
North Carolina State Plan for Medical Assistance

EXHIBITS

For Petitioner: Exhibit 6 – Eligibility Inquiry – K.S.
 Exhibit 7 – Eligibility Inquiry – J.L.
 Exhibit 8 – Eligibility Inquiry – M.B.
 Exhibit 9 – Eligibility Inquiry – B.M.
 Exhibit 10 – US DHHS Office of Inspector General
 Audit of NC Medicaid Dental Services (A-04-13-04014)
 Exhibit 11 - Thumb Drive containing PCG TNOs mailed in 2015 to
 various providers

For Respondent: Exhibit A - May 13, 2015, TNO (Re: \$2,516.61) and
 May 13, 2015, TNO (Re: \$3,317.40)
 Exhibit 1 – Electronic Claims Submission Agreement – Group
 including a Medicaid Provider Participation Agreement
 submitted on August 22,2012

WITNESSES

For Petitioner: Dr. Christopher Brown
For Respondent: N/A

STIPULATED FACTS

The parties agree and stipulated in writing to the following facts:

1. The four beneficiaries were, according to the DHHS portal, MPW [Medicaid for Pregnant Women] eligible on the date of service.
2. Following are the dates of birth for each beneficiary:

M.B. 09/20/2012
J.L. 10/03/2012
K.S. 04/02/2012
B.M. 02/30/2013

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, the above Stipulations, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following FINDINGS OF FACT.

In making the FINDINGS OF FACT, the undersigned Administrative Law Judge has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate facts 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 believable evidence in the case. In the absence of a transcript, the Undersigned has relied upon his notes to refresh his recollection.

FINDINGS OF FACT

1. The parties properly received notice of the hearing by more than fifteen days prior to the hearing.
2. Respondent DMA is the single State agency that is responsible for administering and managing North Carolina's Medicaid program. Pursuant to N.C. Gen. Stat. § 108A-54, DMA is authorized to adopt rules, regulations, and policies for program operation.
3. Petitioner is an oral and maxillofacial surgeon enrolled as a Medicaid provider in the North Carolina Medicaid program. Petitioner provides dental services to Medicaid enrollees in Hickory and the surrounding area. Petitioner executed and entered into a Medicaid Participation Agreement with DMA as part of his enrollment into the program. (Resp. Ex. 1)
4. By entering into the Medicaid Participation Agreement, Petitioner agreed "to operate and provide services in accordance..." with all federal and "[S]tate laws and regulations, medical coverage policies of [DMA], and all guidelines, policies, provider manuals, implementation updates and bulletins published by [DMA] and/or its fiscal agent in effect at the time the service is rendered." (Resp. Ex. 1)
5. Further, Petitioner agreed to "submit claims for services rendered to eligible recipients ... in accordance with rules and billing instructions in effect at the time the service is rendered." (Resp. Ex. 1)
6. As part of its responsibility to the Medicaid program, Respondent DMA is empowered to conduct post payment reviews of dental claims submitted by health care providers such as Petitioner to ensure compliance with the Medicaid program.

7. DMA contracts with PCG to perform certain functions including, among other things, conducting post payment reviews of Medicaid providers.

8. As part of a post payment review of Petitioner, PCG identified overpayments made to Petitioner for dental services that were rendered to recipients who had been covered under the MPW category, but who were no longer pregnant at the time they received the treatment giving rise to this contested case.

9. The definitions, qualifications, and required processes for Medicaid covered dental services are found in Clinical Coverage Policy 4A. Section of 2.4 of Policy 4A applies to MPW limitations and reads: "Limitations. For pregnant Medicaid-eligible recipients covered under the Medicaid for Pregnant Woman program class "MPW", dental services as described in this policy are covered through the day of delivery."

10. As part of Petitioner's agreement with DMA, Petitioner agreed: "to refund or allow the Department to recoup or recover any monies received in error or in excess of the amount to which the provider is entitled from the Department (an overpayment) as soon as the provider becomes aware of said error and/or overpayment or within thirty (30) calendar days of a request for repayment by the Department, regardless of whether the error was caused by the provider or the Department and/or its agents." (Resp. Ex. 1)

11. On or about May 13, 2015, Petitioner received two TNOs from PCG: one for \$3,317.40, and the other for \$2,516.61. (Resp. Ex. A)

12. Petitioner timely appealed these alleged overpayments, and on July 31, 2015, a reconsideration review hearing was held by the Respondent. On August 31, 2015, Respondent DHHS/DMA upheld both alleged overpayments in two separate documents constituting the final agency decision.

13. Petitioner timely appealed the final agency decision to the Office of Administrative Hearings ("OAH").

14. On or about May 4, 2016, Petitioner filed a Motion for Summary Judgment, and, in the alternative, a Motion for Partial Summary Judgment.

15. The Undersigned granted Petitioner's Motion for Partial Summary Judgment on May 25, 2016, which kept four claims at issue out of the original fifteen claims. The claims that remain at issue in the above-captioned case are: K.S., date of service 5/4/12; J.L., date of service 10/22/12; M.B., date of service 10/15/12; and B.M., date of service 4/22/13.

16. A hearing on the merits regarding the remaining four claims was held on May 27, 2016, and the Undersigned presided.

17. Relative to the four claims remaining at issue in this case, Petitioner checked MPW eligibility in the DHHS portal prior to rendering services. The screen shots from the DHHS portal

of all four recipients obtained prior to the date treatment was provided indicate that all four Medicaid recipients were eligible for MPW on the day of treatment at issue for each respective claim. (Pet. Exs. 6, 7, 8, and 9).

18. At the hearing, the parties stipulated that the four recipients were no longer pregnant on the date of treatment at issue for each respective claim. (Stipulated Fact No. 2)

19. The four recipients indicated on Petitioner's medical history form completed on the day they received the treatment giving rise to the four claims at issue in this contested case that they were no longer pregnant.

20. Notwithstanding the fact that the parties stipulated that the four recipients were no longer pregnant on the date of service at issue for each respective claim, counsel for Respondent further stipulated that all four claims' recipients were, according to the DHHS portal, MPW eligible on the date of service at issue for each respective claim. (Stipulated Fact No. 1)

CONCLUSIONS OF LAW

1. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law contain Findings of Fact, they should be so considered without regard to the given labels.

2. Petitioner is an aggrieved person under Chapter 150B and is entitled to commence a contested case. Petitioner has satisfied all conditions precedent and all timeliness requirements for initiating this contested case.

3. All parties are properly before OAH and this tribunal has jurisdiction of the parties and of the subject matter at issue.

4. Petitioner bears the burden of proving by a preponderance of the evidence the facts alleged in the petition. N.C. Gen. Stat. §150B-25.1(a) and N.C. Gen Stat. §108C-12(d).

5. Under 10A NCAC 22F. 0103(b)(5), DMA "shall institute methods and procedures to recoup improperly paid claims."

6. Under 10A NCAC 22F .0601(a), DMA "will seek full restitution of any and all improper payments made to providers by the Medicaid Program."

7. Under 10A NCAC 25H .0203(a)(2) and (3), dentists who provide services under the Medicaid program are required to meet the following standards:

- a. Must provide services in accordance with the rules and regulations of the Medicaid program;
- b. Must agree that the State Medicaid agency or its designee may audit Medicaid dental

records as necessary.

8. DMA, by and through its agent PCG, properly conducted a post payment review of dental claims submitted by Petitioner in order to recoup improperly paid claims.

9. DMA, by and through its agent PCG, properly identified four overpayments made to Petitioner for dental services that were rendered to recipients who had been covered under the MPW category, but who were no longer pregnant at the time they received the treatment giving rise to this contested case.

10. Clinical Coverage Policy 4A limits dental services for beneficiaries under the MPW benefit category. Medicaid payment for this benefit category ends at the date of termination of the pregnancy. Clinical Coverage Policy 4A, section 2.4.

11. Relative to the four claims at issue in this case, Petitioner checked MPW eligibility prior to rendering services. There is no question that DHHS' own portal indicated that all four claims at issue in this case were MPW eligible on the date of service at issue for each respective claim.

12. However, Petitioner was aware that the four recipients he treated under the MPW benefit category, whose treatment resulted in the four claims which are the subject matter of this contested case, were no longer pregnant at the time the Petitioner rendered the disputed service.

13. Petitioner was made privy to the fact that the recipients were no longer pregnant when he had the recipients provide an updated medical history form at their scheduled visit. Requiring patients to update their medical history is a practice applied by Petitioner for all patients. In order to verify MPW eligibility, it is not unreasonable for Petitioner to review the recipients updated medical history to determine the recipient's pregnancy status.

14. Petitioner was aware that the MPW benefit category is limited to women who are pregnant.

15. Petitioner's four separate claims at issue in this contested were improperly paid because Petitioner knew that the four women were no longer pregnant at the time treatment was provided to the recipients.

16. Respondent is entitled to be repaid the Medicaid funds Petitioner was paid for the dental services Petitioner provided to the four women (K.S., date of service 5/4/12; J.L., date of service 10/22/12; M.B., date of service 10/15/12; and B.M., date of service 4/22/13) who presented to him under the MPW category who were no longer pregnant at the time he provided the service.

17. Petitioner did not meet his burden of showing by a preponderance of the evidence that DMA exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule, when it sought recoupment for the four identified overpayments being the subject matter of this contested case.

18. Petitioner argues that the analysis set forth in the North Carolina Court of Appeals decision in N.C. DHHS, DMA v. Parker Home Care, LLC, 784 S.E.2d 552 (2016) should be applied in this matter. The Undersigned declined to apply the analysis argued for by the Petitioner, in light of the following:

- A. Parker Home Care, LLC involves an analysis of whether TNO's issued by PCG constitute a final agency decision. Whereas in this contested case, the final agency decision was made by the Respondent and set forth in the August 31, 2015, Reconsideration Review letters; and
- B. A Petition for Discretionary Review and Petition for Writ of Supersedeas was filed in North Carolina Supreme Court on May 10, 2016. On May 11, 2016, the North Carolina Supreme Court entered an Order Granting a Temporary Stay. Accordingly, application of the Court of Appeals decision in Parker Home Care, LLC has been stayed by the North Carolina Supreme Court pending, at least, its review of the Department's Petition for Discretionary Review.

DECISION AND ORDER

NOW THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that Petitioner has failed to establish that Respondent exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule, when it sought recoupment for the four identified overpayments in this matter. Respondent's decision is hereby **AFFIRMED**.

IT IS SO ORDERED.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing 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 copy of the Administrative Law Judge's Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. **This Final Decision was served on the parties as indicated on the Certificate of Service attached to this Final Decision.**

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 11th day of August 2016.

David F Sutton
Administrative Law Judge